

No. 11803

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

*see vol. 2505*

JOHN BARCOTT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Western District of Washington,  
Southern Division

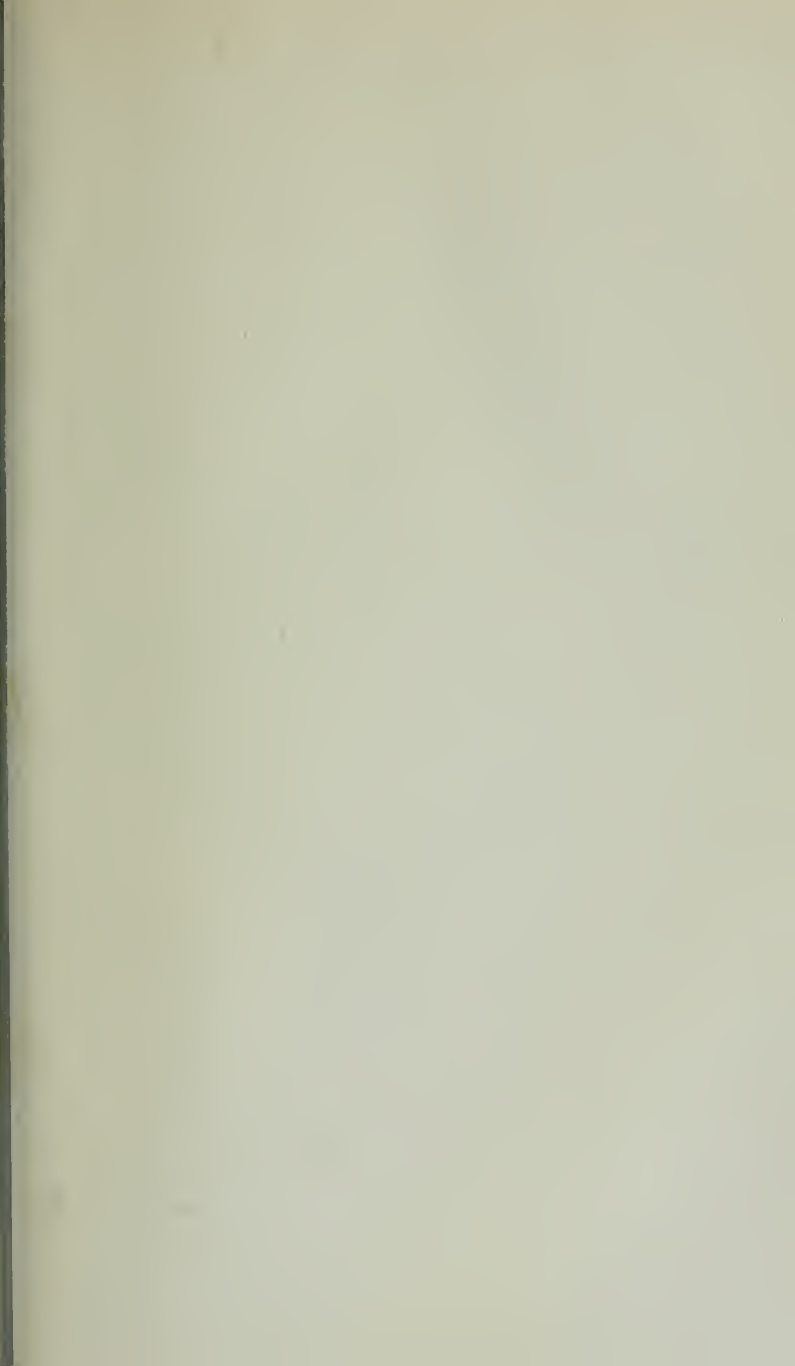
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PAUL P. O'BRIEN,

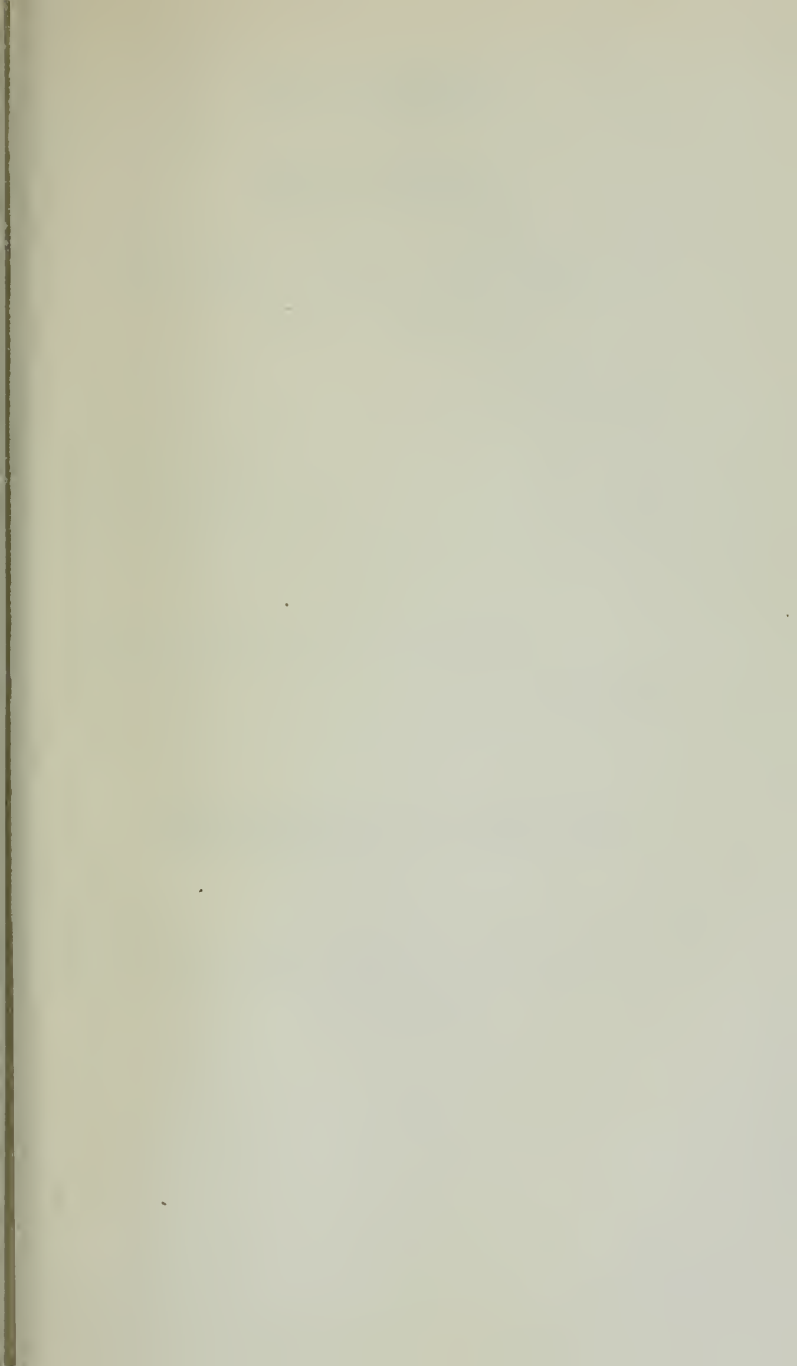
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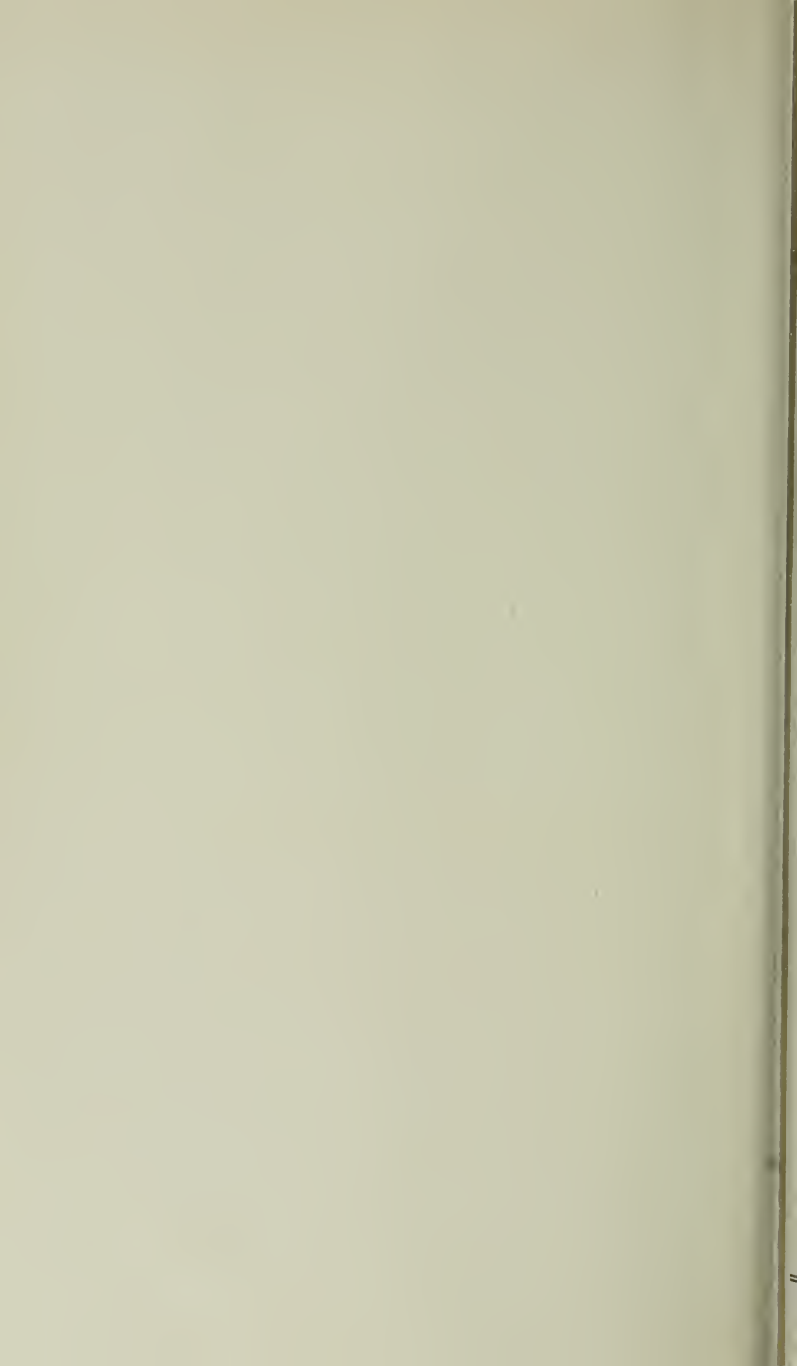












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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF COUNSEL

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Tacoma, Washington.

Attorneys for Appellant.

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324 Post Office Building,  
Tacoma, Washington.

HARRY SAGER,  
Assistant United States Attorney,  
324 Post Office Building,  
Tacoma, Washington.

Attorneys for Appellee.

United States District Court, Western District of  
Washington, Southern Division

No. 15845

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN BARCOTT,

Defendant.

### INDICTMENT

The Grand Jury charges:

#### Count I.

That on or about the 12th day of February, 1944, at Tacoma, Washington, John Barcott, late of the City of Tacoma, State of Washington, who during the calendar year 1943 was married and had no dependents, did wilfully and knowingly attempt to defeat and evade a large part of the income and victory tax due and owing by him to the United States of America for the calendar year 1943 by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Washington, at Tacoma, Washington, a false and fraudulent income and victory tax return wherein he stated that his net income for said calendar year, computed on the community-property basis, was the sum of \$6,720.40 and that the amount of tax due and owing thereon was the sum of \$1,545.38, whereas, as he then and there well knew, his net income for the said cal-

endar year, computed on the community-property basis, was the sum of \$12,406.33, derived as follows:

## Gross Income:

Dividends .....	\$	140.00	
Interest .....		141.93	
Interest on bonds.....		200.00	
Income from business .....	24,621.96		\$25,103.89

## Deductions:

Contributions .....	\$	200.00	
Taxes .....		91.23	291.23

Net Income: .....			\$24,812.66
John Barcott one-half community share			12,406.33

upon which said net income he owed to the United States of America an income and victory tax of \$3,646.25.

All in violation of 26 USC 145(b).

## Count II.

That on or about the 13th day of February, 1945, at Tacoma, Washington, John Barcott, late of the City of Tacoma, State of Washington, who during the calendar year 1944 was married and had no dependents, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1944 by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Washington, at Tacoma, Washington, a false and fraudulent income tax return wherein he stated that his net income for said calendar year, computed on the community-property basis,

was the sum of \$5,632.57 and that the amount of tax due and owing thereon was the sum of \$1,288.45, whereas, as he then and there well knew, his net income for the said calendar year, computed on the community-property basis, was the sum of \$9,926.61, derived as follows:

Gross Income:

Dividends and interest .....	\$	818.27	
Income from business .....		20,034.94	\$20,853.21

John Barcott one-half community share .....			\$10,426.61
--	--	--	-------------

Deductions:

Standard .....	\$	500.00	\$ 500.00
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Net Income: .....			\$ 9,926.61
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upon which said net income he owed to the United States of America an income tax of \$2,727.85.

All in violation of 26 USC 145(b).

Count III.

That on or about the 15th day of March, 1946, at Tacoma, Washington, John Barcott, late of the City of Tacoma, State of Washington, who during the calendar year 1945 was married and had no dependents, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1945 by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Washington, at Tacoma, Washington, a false and fraudulent income tax return wherein he stated that his net income for said calendar year,

computed on the community-property basis, was the sum of \$7,388.98 and that the amount of tax due and owing thereon was the sum of \$1,833.36, whereas, as he then and there well knew, his net income for the said calendar year, computed on the community-property basis, was the sum of \$11,-138.92, derived as follows:

Gross Income:

Dividends and interest .....	\$ 1,258.74	
Income from business .....	22,019.09	\$23,277.83
<hr/>		<hr/>
John Barcott one-half community share .....		\$11,638.92

Deductions:

Standard .....	500.00	500.00
<hr/>		<hr/>

Net Income: ..... \$11,138.92

upon which said net income he owed to the United States of America an income tax of \$3,201.96.

All in violation of 26 USC 145(b).

A true bill.

/s/ HANS M. ANDERSON,  
Foreman.

/s/ J. CHARLES DENNIS,  
United States Attorney.

/s/ HARRY SAGER,  
Assistant United States  
Attorney.

Bail, \$2500.00.

/s/ CHARLES H. LEAVY,  
U. S. District Judge.

[Endorsed]: Filed May 13, 1947.

District Court of the United States, Western District of Washington, Southern Division

Commissioner's Docket No. 6

Case No. 718

UNITED STATES OF AMERICA,

vs.

JOHN BARCOTT.

COURT APPEARANCE BOND  
FOR JOHN BARCOTT

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to the United States of America the sum of Twenty-five Hundred dollars (\$2500.).

The condition of this bond is that the defendant, John Barcott, is to appear in the District Court of the United States for the Western District of Washington at Tacoma, Washington, in accordance with all orders and directions of the court relating to the appearance of the defendant before the court in the above entitled case and if the defendant appears as ordered, then this bond is to be void, but if the defendant fails to perform this condition payment of the amount of the bond shall be due forthwith. If the bond is forfeited and the forfeiture is not set aside or remitted, judgment may be entered upon motion in the District Court



United States Commissioner.

## JUSTIFICATION OF SURETIES

I, the undersigned surety, on oath say that I reside at 3705 South Sheridan, Tacoma, Washington; and that my net worth is the sum of Twenty-five Hundred dollars (\$2500.00).

I further say that I am depositing the sum of \$2500.00 in cash with the Clerk, United States District Court, Western District of Washington, Southern Division, Tacoma, Washington, as security of the United States for the Western District of Washington against each debtor jointly and severally for the amount above stated together with interest and costs, and execution may be issued or payment secured as provided by the Federal Rules of Criminal Procedure and other laws of the United States.

This bond is signed on this 14th day of May, 1947, at Tacoma, Washington.

/s/ JOHN BARCOTT,

Name of Defendant.

3705 South Sheridan,  
Tacoma, Washington.

Approved, signed and acknowledged before me  
this 14th day of May, 1947.

[Seal]      /s/ STUART H. ELLIOTT,

ity and indemnity on this bond, in accordance with the terms and conditions thereof.

/s/ JOHN BARCOTT,

Surety.

Sworn to and subscribed before me this 14th day of May, 1947, at Tacoma, Wash.

/s/ STUART H. ELLIOTT,

U.S. Commissioner.

[Endorsed]: Filed May 14, 1947.

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United States District Court, Western District of  
Washington, Southern Division

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 19th day of May, 1947, the Hon. Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal Record of said Court:

[Title of Cause.]

Now on this 19th day of May, 1947, this cause comes on before the court for arraignment and plea. Harry Sager, Asst. U. S. Attorney, represents the government. Defendant in court represented by Counsel A. Ursich. Defendant and his counsel come forward and waive reading of the Indictment. Defendant arraigned and now enters a plea of not guilty to Counts 1, 2 and 3, which plea is ordered entered. Cause is set for trial on June 24.

United States District Court, Western District of  
Washington, Southern Division

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 25th day of September, 1947, the Hon. Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.]

Now on this 25th day of September, 1947, this cause comes on before the court for hearing on Defendant's motion for Bill of Particulars. Harry Sager, Asst. U. S. Attorney, represents the government and Frank Hale represents the defendant. Argument on motion for Bill of Particulars by Mr. Hale and Mr. Sager. Defendant's motion to dismiss denied and exception allowed. Defendant's motion for Bill of Particulars is now granted by the court with certain limitation. On Court's own motion, cause is reset for trial to a jury on Thursday, October 30th.

[Title of District Court and Cause.]

### MOTION TO DISMISS INDICTMENT

Comes now the defendant above named and moves to dismiss the indictment herein for the following reasons and upon the following grounds:

#### I.

That said indictment does not state facts sufficient to constitute a crime against the United States.

#### II.

That each count of said indictment, and the whole thereof, is so indefinite, vague, and uncertain that the defendant cannot ascertain and understand therefrom the nature of the charges against him in said indictment contained and cannot with reasonable diligence prepare his defense thereto.

GAGLIARDI, URSICH &

GAGLIARDI and

FRANK HALE,

Attorneys for Defendant,

1116 Washington Building,

Tacoma 2, Washington.

Copy received May 28, 1947.

HARRY SAGER,

Assistant U. S. Attorney.

[Endorsed]: Filed May 28, 1947.

[Title of District Court and Cause.]

## MOTION FOR BILL OF PARTICULARS

Comes now the defendant above named and respectfully moves the Court for an order directing the plaintiff above named to furnish and supply to the defendant a Bill of Particulars herein, making the indictment more definite and certain, and setting in said Bill of Particulars the following, to-wit:

### I.

With respect to Count I of said indictment:

1. By setting forth which items of gross income are alleged to have been falsely reported by the said defendant.

2. That in the event that it is charged that either the alleged items of dividends, interest, interest on bonds, or income from business, are alleged to have been falsely reported by the defendant, to set forth which of said items and in what particular amount each item is charged to have been falsely reported.

3. Concerning the item designated in the indictment as "Dividends" by setting forth from what source said Dividends are alleged to have been received.

4. Concerning the item designated in the indictment as "Interest" by setting forth from what source said Interest is alleged to have been received.

5. Concerning the item designated in the Indictment as "Interest on Bonds," by setting forth

from what source said Interest on Bonds is alleged to have been received.

6. Concerning the item designated in the Indictment as "Income from Business," by setting forth the nature, type, or kind of business from which it is alleged that the defendant derived said income.

7. Concerning the item designated in the Indictment as "Income from Business," by setting forth whether or not the figure \$24,621.96 represents the total gross receipts of such business after deduction of the expenses of the operation thereof, and if so, what amounts have been allowed by the plaintiff for expenses of operation of such business.

8. Concerning the item designated in the Indictment as "Income from Business," by setting forth the gross receipts alleged to have been derived from the operation of such business and the amounts allowed by the plaintiff as legitimate expenses of the operation thereof.

## II.

With respect to Count II of said Indictment:

1. By setting forth which items of gross income are alleged to have been falsely reported by the said defendant.

2. That in the event that it is charged that either the alleged items of Dividends and interest or Income from business, are alleged to have been falsely reported by the defendant, to set forth

which of said items and in what particular amount each item is charged to have been falsely reported.

3. Concerning the item designated in the indictment as "Dividends and interest," by setting forth from what source said Dividends and interest are alleged to have been received.

4. Concerning the item designated in the Indictment as "Income from Business," by setting forth the nature, type, or kind of business from which it is alleged that the defendant derived said income.

5. Concerning the item designated in the Indictment as "Income from Business," by setting forth whether or not the figure \$20,034.94 represents the total gross receipts of such business after deduction of the expenses of the operation thereof, and if so, what amounts have been allowed by the plaintiff for expenses of operation of such business.

6. Concerning the item designated in the Indictment as "Income from Business" by setting forth the gross receipts alleged to have been derived from the operation of such business and the amounts allowed by the plaintiff as legitimate expenses of the operation thereof.

### III.

With respect to Count III of said Indictment:

1. By setting forth which items of gross income are alleged to have been falsely reported by the said defendant.

2. That in the event that it is charged that



either the alleged items of Dividends and interest or Income from business, are alleged to have been falsely reported by the defendant, to set forth which of said items and in what particular amount each item is charged to have been falsely reported.

3. Concerning the item designated in the Indictment as "Dividends and interest," by setting forth from what source said Dividends and Interest are alleged to have been received.

4. Concerning the item designated in the Indictment as "Income from Business," by setting forth the nature, type or kind of business from which it is alleged that the defendant derived said income.

5. Concerning the item designated in the Indictment as "Income from Business," by setting forth whether or not the figure \$22,019.09, represents the total gross receipts of such business after deduction of the expenses of the operation thereof, and if so, what amounts have been allowed by the plaintiff for expenses of operation of such business.

6. Concerning the item designated in the Indictment as "Income from Business." by setting forth the gross receipts alleged to have been derived from the operation of such business and the amounts allowed by the plaintiff as legitimate expenses of the operation thereof.

Defendant requests that the plaintiff be required to furnish to this defendant an itemized statement setting forth the sources from which dividends were derived, interest on bonds received, and the



business from which said income was derived as hereinabove requested, and what items, if any, were omitted from the return of income tax made by this defendant.

GAGLIARDI, URSICH &  
GAGLIARDI and  
FRANK HALE,  
Attorneys for Defendant.

State of Washington,  
County of Pierce—ss.

Frank Hale being first duly sworn on oath,  
deposes and says:

That he is one of the attorneys for the defendant in the above entitled case; that the foregoing information is necessary in order for the defendant to properly and adequately prepare his defense to the indictment returned in the above entitled case.

/s/ FRANK HALE.

Subscribed and sworn to before me this 27th  
day of May, 1947.

[Seal]     /s/ A. M. URSICH,  
Notary Public in and for the State of Washington,  
residing at Tacoma.

Received copy May 28, 1947.

/s/ HARRY SAGER,  
Assistant U. S. Attorney.

[Endorsed]: Filed May 28, 1947.

[Title of District Court and Cause.]

ORDER

This matter coming on upon the oral application of the defendant above named requesting leave to file his motion to dismiss, and it appearing to the Court that the said defendant was arraigned at the bar of this Court on the 19th day of May, 1947, in the above entitled cause, and there appearing to be no reason why the said defendant should not be authorized to file his motion to dismiss, now, therefore, it is hereby

Ordered, that defendant's motion to dismiss the indictment herein be and the same hereby is authorized to be filed herein.

Done in open Court this 28th day of May, 1947.

/s/ CHARLES H. LEAVY,  
U. S. District Judge.

Presented by:

/s/ A. M. URSICH.

O.K.

/s/ HARRY SAGER,  
Assistant U. S. Attorney.

[Endorsed]: Filed May 28, 1947.

[Title of District Court and Cause.]

## BILL OF PARTICULARS

Comes now the plaintiff and particularizes the allegations of the indictment herein in accordance with the order of the court heretofore made and in that behalf states as follows:

### I.

Particularizing Count I and the items alleged as constituting gross income, plaintiff states that the sources of such items are as follows:

(1) The dividends are from stock holdings in Fishermans Packing Corporation, at Anacortes, Washington.

(2) The interest is from savings account in National Bank of Washington, Tacoma, and from a real estate contract and conditional sales contract for the sale of personal property, in each of which Antone Barcott was the purchaser.

(3) The item "Interest on Bonds" is interest from United States Savings Bonds, Series "G."

(4) The item "Income from Business" is from a restaurant business known as the California Oyster House, 940 Pacific Avenue, Tacoma, Washington.

### II.

Particularizing Counts II, and III, plaintiff states that the items "Dividends & Interest" are

from the same sources as particularized in Count I, and the items "Income from Business" are from the same business.

/s/ J. CHARLES DENNIS,  
United States Attorney.

/s/ HARRY SAGER,  
Assistant United States  
Attorney.

[Endorsed]: Filed September 30, 1947.

---

United States District Court, Western District of  
Washington, Southern Division

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 30th day of October, 1947, the Hon. Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.]

Now on this 30th day of October, 1947, this cause comes on before the court for trial to a jury. Case is called. Both sides ready. Defendant present in court. Roll call of jury made showing 31 present. Jurors sworn as to qualifications. Juror Ansel F. Steward excused for cause. Jurors Henry Mandles,

William R. Allen and Carl Schafer excused on challenges of the government. Jurors Arthur T. Armstrong, J. J. McDonald, Anna Collinger and George E. Floyd excused on challenges of the defendant. The following jurors drawn, accepted by both sides and sworn to try the case:

George Palmer	Harry E. Burton
Sara M. Sanders	Francis A. Baker
Victor F. Johnson	Wesley D. Lefler
Glen Bettesworth	William J. Hennessy
Edward B. Anderson	Roscoe H. Brown
Lottie B. Mills	David Sampson

All jurors not now serving on this case are excused until Monday, November 10, 1947, at 9:45 a.m. unless otherwise notified. Defendant in court represented by counsel S. A. Gagliardi, Anthony Ursich and Frank Hale. Allen Pomeroy, Asst. U. S. Attorney, represents the government.

Trial is commenced. At 10:55 a.m. jurors admonished. At 11 a.m. court recessed. At 11:15 a.m. court is again in session. Defendant, jurors and all counsel present. Opening statement by Mr. Pomeroy. Defendant reserves opening statement. Plaintiff witness Stanley Nielsen is sworn and testifies. Plaintiff exhibits 1, 2, 3, 4, 5 and 6 admitted. At 12 noon jurors are excused until 2 p.m. Remarks by Mr. Gagliardi and the Court. Defendant's motion to strike is denied by the Court and exception allowed.

At 12:10 p.m. court recessed until 2 p.m. At 2 p.m. court is again in session. Defendant, jurors and all counsel present. Plaintiff witness Sparks Washburn is sworn and testifies. Plaintiff exhibit 7 admitted over the objections of defendant's counsel and exception allowed. Plaintiff exhibits 8, 9 and 10 admitted. Plaintiff exhibit 11 admitted over the objections of defendant's counsel and exception allowed. Plaintiff witness James Kerr is sworn and testifies. Plaintiff exhibit 12 admitted. Plaintiff witness John Planchich is sworn and testifies. Plaintiff exhibit 13 marked for identification and withdrawn from the custody of the clerk by permission of the court (both counsel so agree). Plaintiff witness Josephine Corvin is sworn and testifies. Plaintiff witness Harry O. Swanson is sworn and testifies.

At 3:15 p.m. court recessed. At 3:30 p.m. court is again in session. Defendant, jurors and all counsel present. Trial resumes. Harry O. Swanson resumes the witness stand for further testimony. Plaintiff exhibit 14 admitted conditionally, over the objections of defendant's counsel. Plaintiff exhibits 15, 16 and 17 admitted. At 4 p.m. the government rests. Jurors admonished and excused until 10 a.m. Friday. Mr. Ursich and Mr. Hale make argument re: motion to dismiss and for a directed verdict, which are denied by the court and exception allowed. Remarks by the Court. Court allows Mr. Ursich to withdraw plaintiff exhibits 7, 8 and 9. Trial is continued until Friday, October 31st, at 10 a.m.

United States District Court, Western District of  
Washington, Southern Division

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 31st day of October, 1947, the Hon. Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.]

Now on this 31st day of October, 1947, this cause comes on before the court for further trial to a jury. Defendant and all counsel present. Statement on motion to dismiss made by Mr. Gagliardi. Motion to dismiss is denied by the Court and exception allowed. All jurors now present. Trial resumes. Statement by Mr. Ursich. Defendant witness John Barcott is sworn and testifies.

At 11 a.m. court recessed. At 11:15 a.m. court is again in session. Defendant, jurors and all counsel present. Defendant witness John Barcott resumes the witness stand for further testimony. Defendant exhibits A-1 and A-2 admitted.

At 12 noon court recessed until 2 p.m.

At 2 p.m. court is again in session. Trial is suspended for hearing of ex parte matters.

At 2:10 p.m. trial resumes. Defendant, jurors and all counsel present. Defendant witness John Barcott resumes the *witness* for further testimony.

Defendant witness Katy Barcott is sworn and testifies. Defendant witness Anton Barcott is sworn and testifies. Plaintiff witness John Plancich resumes the stand for further testimony. Defendant witness Anton Suyran is sworn and testifies. Defendant witness Mrs. Pearl McCord is sworn and testifies. Jurors admonished. Jurors are now excused until Monday at 10 a.m. Mr. Gagliardi withdraws Defendant exhibit A-3 from the custody of the clerk by permission of the court. Trial is continued until Monday morning at 10 a.m.

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United States District Court, Western District of  
Washington, Southern Division

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 3rd day of November, 1947, the Hon. Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.]

Now on this 3rd day of November, 1947, this cause comes on before the court for further trial to a jury. Defendant, jurors and counsel present. Trial resumes. Defendant witness Marie Dascher is sworn and testifies. Defendant witness Robert B. Knego is sworn and testifies. Defendant witness



Robert E. Birch resumes the witness stand for further testimony. Defendant exhibit A-3 offered but not admitted and exception allowed.

At 11:20 a.m. court recessed. At 11:45 a.m. court is again in session. Defendant, jurors and all counsel present. Trial is resumed. Defendant witness Robert E. Birch resumes the witness stand for further testimony. Stipulation as to Mr. Barcott's employment of Attorney Thomas Ray and subsequent loss of records; entered herein by counsel for both parties. Stipulation as to the \$1200.00 in the Income Tax Return of John Barcott for 1945 as being correct; entered herein by counsel for both parties. Defendant witness John Barcott resumes the witness stand for further testimony. Plaintiff exhibits 20 and 21 admitted. At 12:15 p.m. defendant rests. Court now grants each side one hour to argue case.

At 12:15 p.m. court recessed until 2 p.m. At 2 p.m. court is again in session. Defendant, jurors and all counsel present. Jurors are now excused by the court. Defendant's motion for acquittal made by Mr. Ursich and denied by the Court. Defendant's counsel excepts to certain instructions and exceptions allowed. Jury is again present in court. Mr. Pomeroy begins argument. Mr. Hale begins argument.

At 3:20 p.m. court recessed. At 3:35 p.m. court is again in session. Defendant, jurors and all counsel present. Mr. Gagliardi begins argument. Mr. Pomeroy makes concluding argument. At 4:15 p.m. jury is charged by the court.

At 4:50 p.m. jurors retire to deliberate. Plaintiff exhibit 14 admitted. Edith Redmayne sworn in as special bailiff and bailiffs are now sworn upon taking charge of the jury.

At 4:55 p.m. court adjourned until reconvened. Plaintiff and defendant requested instructions are filed.

At 10:20 p.m. court is again in session. Defendant, jurors and counsel Frank Hale and Anthony Ursich represent the defendant. Guy A. B. Dovell, Asst. U. S. Attorney, represents the government. Jury Foreman Roscoe H. Brown states that the jury has arrived at a verdict, which is handed to the court and the clerk and read by the clerk as follows: We the jury empanelled in the above entitled cause find the defendant John Barcott guilty as charged in count 1 of the indictment herein; guilty as charged in count 2 of the indictment herein; guilty as charged in count 3 of the indictment herein. Dated November 3, 1947. Signed Roscoe H. Brown, Foreman. Jurors are polled and each answers affirmatively and verdict is ordered entered. Jurors are now excused and are to report at 10 a.m. Monday, November 10, 1947, unless otherwise notified. Court orders that defendant may remain at large on present bond of \$2500.00.

United States District Court for the Western  
District of Washington, Southern Division

No. 15845

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN BARCOTT,

Defendant.

PLAINTIFF'S REQUESTED INSTRUCTIONS

Instruction No. One

This is a criminal action in which the defendant, John Barcott, is charged by an indictment with the violation of the Internal Revenue law. The indictment contains three counts and specifically alleges, in the first count, that on or about February 12, 1944, at Tacoma, Washington, John Barcott wilfully attempted to defeat and evade a large part of the income tax due and owing by him for the calendar year 1943. That he did this by filing with the Collector of Internal Revenue a false and fraudulent income tax return wherein he stated that his income for said calendar year was the sum of \$6,720.40, and that the amount of tax due and owing thereon was the sum of \$1,545.38, whereas, as he then and there well knew, his net income for the said calendar year was the sum of \$12,406.33 and that the tax due thereon was the sum of \$13,646.25.

The second count alleges that on or about February 13, 1945, at Tacoma, Washington, John Barcott wilfully attempted to defeat and evade a large part of the income tax due and owing by him for the calendar year 1944. That he did this by filing with the Collector of Internal Revenue a false and fraudulent income tax return wherein he stated that his net income for said calendar year was the sum of \$5,632.57 and that the amount of tax due and owing thereon was the sum of \$1,288.45, whereas, as he then and there well knew, his net income for the said calendar year was the sum of \$9,926.61 and that the tax due thereon was the sum of \$2,727.85.

Count three of the indictment charges that John Barcott wilfully attempted to defeat and evade a large part of the income tax due and owing by him for the calendar year 1945, by filing on March 15, 1946, a false and fraudulent income tax return wherein he stated that his net income for 1945 was the sum of \$7,388.98 and that the amount of tax due and owing thereon was the sum of \$1,833.36, whereas, as he then and there well knew, his net income for the said calendar year 1945, was \$11,138.92 and that the tax due thereon was the sum of \$3,201.96.

The defendant has entered a plea of not guilty to all of the charges contained in the indictment, and that places upon the government the burden of proving all material allegations in said charge beyond a reasonable doubt.

Given in substance.

C. H. L.

## Instruction No. Two

This indictment is brought under a section of the Internal Revenue law which provides as follows:

“\* \* \* Any person who wilfully attempts in any manner to evade or defeat any tax imposed \* \* \* or the payment thereof, \* \* \*” shall be punished.

The essential elements of the offense charged in the indictment under this law are these:

1. That the defendant owed more income tax than shown in his return.
2. That he wilfully attempted to evade or defeat any part of said tax bill by filing a false return or by attempting to conceal from the Collector his true and correct income.

If you find the existence of each of these elements beyond a reasonable doubt you should find the defendant guilty. If you have any reasonable doubt as to the existence of either of these elements you should acquit him.

Given in substance.

C. H. L.

## Instruction No. Three

You will observe that one of these elements of the offense charged in Count One, is that the defendant wilfully attempted to evade or defeat payment of his just tax. A wilful attempt means an intentional one and it is, therefore, necessary that the

government prove that in filing his income tax return for 1942, the defendant thereby intended to evade and defeat payment of some portion of his income tax. It is psychologically impossible for you to enter into the mind of the defendant and determine the intent with which he operated. You must, therefore, determine the motive, purpose and intent from the testimony which has been presented, and you will consider all of the circumstances disclosed by the evidence, bearing in mind that the law presumes that every man intends the legitimate consequent of his own acts. Wrongful acts, knowingly or intentionally committed, cannot be justified on the ground of innocent intent. The color of the act determines the complexion of the intent. Intent is presumed when the unlawful act is proven to have been knowingly committed.

Given in substance.

C. H. L.

#### Instruction No. Four

You are instructed that the government is not obliged to prove an attempted evasion of the entire amount of the tax as alleged in the indictment, but it is sufficient for the government to prove beyond a reasonable doubt that the defendant attempted to evade any substantial portion of the tax liability.

Given.

C. H. L.

[Endorsed]: Filed Nov. 3, 1947.

[Title of Court and Cause.]

DEFENDANT'S REQUESTED  
INSTRUCTIONS

Instruction No. 1

You are instructed that the fact that this defendant has been indicted and placed on trial before you is no evidence that he is guilty of the crime charged. All the presumptions of law are that he is innocent. This presumption of law stays with him throughout all the stages of the trial until the evidence, introduced for your consideration, becomes so strong as to break down this presumption and convinces you beyond all reasonable doubt of his guilt.

A "reasonable doubt" is such a doubt that causes a man of ordinary prudence to pause and hesitate in one or more important transactions of life concerning his own affairs.

If you have such a doubt, you must acquit the defendant.

Given in substance.

C. H. L.

Instruction No. 2

You are instructed that the prosecution relies upon what has been referred to by the Government's witness as the "net worth" of the defendant on a certain date; that is, that the defendant's "net worth" or that the total assets owned by the defendant on December 31, 1942, were of a stated amount, and that between January 1, 1943, and the



31st day of December, 1943, his assets or "net worth" had increased to an amount over and above what he reported was his net income for that year; likewise, the prosecution contends that his net worth on the 1st day of January, 1944, was a stated amount, and that at the end of that year his "net worth" or assets had increased to an amount greatly in excess of the amount which he reported was his net income for the year. The same contention is made for the year 1945.

Given in substance.

You are instructed that the prosecution must prove to you, beyond all reasonable doubt, the following facts:

- (a) That the defendant on December 31, 1942, did not own or possess any greater amount of assets or "net worth" than that which the prosecution claims the defendant owned on that date.

Refused.

- (b) That between the 1st day of January, 1943, and the 31st day of December of that year, the assets or "net worth" of the defendant increased substantially to an amount in excess of what he reported was his net income for that year.

Given in substance.

- (c) That the assets purchased for the year 1943 were purchased and acquired with net in-



come of the defendant derived from the following sources:

Refused.

2-A.

1. Dividends from the Fishermen's Packing Corporation of Anacortes, Washington;

2. Interest from savings accounts in the National Bank of Washington, Tacoma, Washington, from a real estate contract and personal property conditional sales contract in which Antone Barcott was the purchaser;

3. Interest on bonds from U. S. Savings Bonds, Series G;

4. Net income from his business known as the California Oyster House, 940 Pacific Avenue, Tacoma, Washington, and from no other sources.

(d) That the defendant wilfully and knowingly, for the purpose of evading a large amount of tax, did file or cause to be filed with the Collector of Internal Revenue a false and fraudulent income tax and victory tax return wherein he stated that his net income for that year was substantially less than the net income of the defendant.

The same rule of law applies for the calendar years 1944 and 1945.

A "substantial amount" means an amount substantially in excess of what the defendant actually paid.

Unless the Government has proven to you, beyond all reasonable doubt, the foregoing facts, it is your duty to acquit the defendant.

Refused.

C. H. L.

Instruction No. 3

The essential element of the commission of the offense charged in each of the counts of the indictment is the willful attempt to defeat and evade an income tax and victory tax due from the defendant to the United States for the years 1943, 1944 and 1945.

The term "willful" implies on the part of the defendant a knowledge and a purpose to do wrong.

You are, therefore, instructed, and unless you find in the case beyond a reasonable doubt that the defendant, with a knowledge and purpose to do wrong, attempted to evade and defeat the income taxes due from him in the United States during such years, and that such attempt was with an intention on his part to defraud the Government, you will acquit the defendant; or if you have a reasonable doubt of the defendant's "wilfulness" as that term has been defined to you, or if you have a reasonable doubt of the defendant's intention to defeat and evade the payment of the tax due from him, notwithstanding the fact that you may have come to the conclusion that the defendant actually owed a tax to the United States for such years, you will acquit the defendant.

Given in substance.

C. H. L.

## Instruction No. 4

In connection with the expression "willful attempt to defeat or evade" the tax, you are instructed that the word "willful" means knowingly, intentionally, and with an evil motive.

It is not intended by the law that a person who in good faith misunderstands his tax liability, or omits to report items which he honestly believes are not taxable or does not regard as income in the ordinary sense of the word, or who negligently fails to make an accurate report or who fails to maintain adequate records, should become a criminal by his failure to measure up to the prescribed standard of conduct.

The law only intends that those persons who knowingly, intentionally and with evil motive attempt to defeat or evade their tax should be criminally punished.

Therefore, even though you were to find that the defendant failed to pay or report the correct amount of income and victory taxes due from him to the United States during the years 1943, 1944 and 1945, nevertheless, if such failure on his part was not knowingly and intentionally done and was not accompanied by an evil motive to defeat or evade the tax, then you must return a verdict of acquittal.

Given in substance.

C. H. L.

## Instruction No. 5

You are instructed that if you find from the evidence that the defendant committed or attempted to commit some offense other than the one charged in the indictment, such finding does not justify you to find the defendant guilty of the crime charged in the indictment. Such evidence cannot establish guilt under the present charge. It is submitted to you as a circumstance only, which can be considered with other facts and circumstances in determining the guilt or innocence of the defendant, and for no other purpose.

Given in substance.

C. H. L.

## Instruction No. 6

You are instructed that the prosecution in this case relies upon circumstantial evidence to convict the defendant. Circumstantial evidence is legal and competent evidence, but to justify the inference of guilt from circumstantial evidence alone, the facts proven from which it is asked that the guilt of the defendant be inferred must be proven beyond a reasonable doubt, must be consistent with each other and must not only clearly point to his guilt, but must be inconsistent with any other reasonable theory upon which his innocence may be maintained.

Unless you so find, it is your duty under your oath to acquit the defendant.

Given in substance.

C. H. L.

## Instruction No. 7

It is an essential element of the offense as charged in the indictment, which must be proved to you beyond a reasonable doubt, that there was actually a tax due from the defendant over and above which he has reported during the years 1943, 1944 and 1945, and not for any other year.

Given in substance.

C. H. L.

If you do not find from the evidence submitted to you, beyond a reasonable doubt, that there are taxes due for the above-mentioned years over and above that reported by him, then you must acquit the defendant, even though you may find that the defendant should have paid additional tax for other years.

Refused not an issue.

C. H. L.

[Endorsed]: Filed November 3, 1947.

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[Title of District Court and Cause.]

## REQUESTED INSTRUCTION No. 8

Comes Now the defendant and respectfully requests this Honorable Court that the hereto attached instruction be given to the Jury, and that the same

be added and attached to the instructions requested by the defendant and marked "Instruction No. 8."

GAGLIARDI, URSICH &  
GAGLIARDI,  
Attorneys for Defendant.

/s/ FRANK HALE.

Instruction No. 8

You will not be justified in this case of convicting the defendant of having wilfully and knowingly attempted to defeat and evade the payment of his just tax if you find that small amounts were omitted from his income tax return which could easily be overlooked or forgotten by the defendant.

The Government must prove to you, beyond a reasonable doubt, that the amount, if any, which the defendant failed to pay, was a substantial amount, and although the Government need not prove the exact amount set forth in the indictment, it must, nevertheless, be an amount substantially in excess of what the defendant actually paid.

Given in part.

Refused in part.

C. H. L.

[Endorsed]: Filed November 3, 1947.

District Court of the United States, Western  
District of Washington, Southern Division

No. 15845

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN BARCOTT,

Defendant.

VERDICT

We, the jury empanelled in the above-mentioned  
cause, find defendant John Barcott

.....guilty as charged in Count I of the Indict-  
ment herein;

.....guilty as charged in Count II of the Indict-  
ment herein;

.....guilty as charged in Count III of the In-  
dictment herein.

Dated November 3, 1947.

/s/ ROSCOE H. BROWN,  
Foreman.

[Endorsed]: Filed November 3, 1947.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT OF ACQUITTAL,  
OR, IN THE ALTERNATIVE, FOR A NEW  
TRIAL.

The defendant hereby renews his motion for judgment of acquittal heretofore made at the conclusion of the Government's case in chief, and also made at the close of all the evidence, or, in the alternative, the defendant moves the court to grant him a new trial for the following reasons:

1. The court erred in denying defendant's motion for acquittal at the conclusion of the evidence.
2. The verdict is contrary to the weight of the evidence.
3. The verdict is not supported by substantial evidence.
4. The court erred in admitting testimony of the witness Stanley Nielsen, to which objections were made.
5. The court erred in admitting testimony of the witness Harry O. Swanson, to which objections were made.
6. The court erred in admitting testimony of the witness James T. Kerr, to which objections were made.
7. The court erred in the admission of the Government's Exhibit No. 11, to which objections were made.
8. The court erred in charging the jury and in refusing to charge the jury as requested.



9. The court erred in overruling objections to questions addressed to the defendant on cross-examination.

10. The court erred in failing to limit the Government in its proof in conformance with the Indictment and Bill of Particulars and in allowing the Government to introduce evidence in substantial variance therewith.

11. The court erred in precluding defendant's counsel from making adequate objections to testimony being introduced by the Government.

12. The defendant was substantially prejudiced and deprived of a fair trial by reason of the following circumstances: The attorney for the Government stated in his argument that the defendant was guilty without drawing said deduction from a reference to the evidence; that this was an important case to the Government, and that this verdict was needed to set an example to other taxpayers.

GAGLIARDI, URSICH &  
GAGLIARDI,  
/s/ FRANK HALE,  
Attorneys for Defendant.

Receipt acknowledged this 5th day of November, 1947.

/s/ HARRY SAGER,  
Ass't. U. S. Attorney D.B.

[Endorsed]: Filed November 5, 1947.

United States District Court, Western District  
of Washington, Southern Division

No. 15845

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN BARCOTT,

Defendant.

### JUDGMENT AND SENTENCE

On this 24th day of November, 1947, came the attorney for the government and the defendant appeared in person and by Anthony M. Ursich and Frank Hale, his attorneys, and the court having directed that no pre-sentence investigation be made,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, a jury having been regularly impanelled and a trial held on the merits and a verdict of guilty rendered by the jury of a violation of 26 USC 145(b) (Income tax evasion), as charged in Counts I, II, and III of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten (10) months on each of counts I, II, and III, and further that he pay to the United States of America the sum of \$750.00 on each of said counts, making a total fine of \$2,250.00, and further that he pay the costs of prosecution herein to be taxed, and that he stand committed until such fine and costs are paid or until he is otherwise discharged in the manner provided by law. Provided that the sentences of imprisonment as to each of said counts shall run concurrently with each other and not consecutively.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that a copy serve as the commitment of the defendant.

Done In Open Court this 24th day of November, 1947.

/s/ CHARLES H. LEAVY,

United States District Judge.

Presented by:

/s/ HARRY SAGER,

Assistant United States  
Attorney.

Entered in Crim. Docket 11, on November 24, 1947.

MILLARD P. THOMAS,  
Clerk.

[Endorsed]: Filed November 24, 1947.

United States District Court, Western District  
of Washington, Southern Division

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 24th day of November, 1947, the Hon. Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.]

Now on this 24th day of November, 1947, this cause comes on before the court for motion for new trial. Defendant in court represented by counsel Anthony Ursich. Harry Sager, Asst. U. S. Attorney, represents the government. Mr. Ursich argues defendant's motion for new trial. Motion for a directed verdict and motion for new trial now denied by the Court. Remarks by the Court. Court now states that a pre-sentence report in the above cause will not be necessary.

Defendant in court represented by counsel Anthony Ursich and Frank Hale. Remarks by the Court. It is the judgment of this court that the defendant upon the verdict of guilty, is guilty and is sentenced to be committed to the custody of the Attorney General to serve a sentence of 10 months on counts 1, 2 and 3 of the indictment, said sentence to run concurrently, and to pay a fine of \$750.00 on each of the three counts of the indictment. Present bond of \$2500.00 to remain in effect.

At 11:45 a.m. defendant is again in court represented by counsel Anthony Ursich and Frank Hale. Written Judgement and Sentence having been approved by the defendant and his counsel as orally pronounced is now signed by the court and filed.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Appellant: John Barcott, 3705 South Sheridan, Tacoma, Washington.

Attorneys for Appellant: Gagliardi, Ursich & Gagliardi and Frank Hale, 1116 Washington Building, Tacoma, Washington.

Offense: Attempt to defeat and evade income tax. Charged on three counts for the years 1943, 1944 and 1945 respectively. (26 USC 145(b)).

Judgment entered against the appellant on the 24th day of November, 1947, having been convicted upon his plea of not guilty by a jury and sentenced to ten months imprisonment on each count, said sentences of imprisonment to run concurrently and not consecutively, and also to pay a fine of \$750.00 on each count and to pay the costs of prosecution.

The above named appellant, through his attorneys of record, Gagliardi, Ursich & Gagliardi and Frank Hale, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the above stated judgment.

Dated November 25, 1947.

GAGLIARDI, URSICH &  
GAGLIARDI,  
FRANK HALE,  
Attorneys for Appellant.

Certified copy of the within Notice of Appeal, together with Clerk's Statement of Docket Entries herein, sent to Clerk, U. S. Circuit Court of Appeals this 26th day of November, 1947. Copy also delivered to U. S. Attorney.

E. E. REDMAYNE,  
Deputy Clerk.

[Endorsed]: Filed November 25, 1947.

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[Title of District Court and Cause.]

### STIPULATION

It is hereby stipulated and agreed by and between the above named defendant through his attorneys of record, and the plaintiff, through its attorneys of record, that an order may be entered authorizing the court to extend the defendant's time in which to file his record on appeal and docket the cause of action up to and including the 4th day of February, 1948.

/s/ J. CHARLES DENNIS,  
United States Attorney,  
/s/ HARRY SAGER,  
Asst. United States Attorney,  
Attorneys for Plaintiff.

GAGLIARDI, URSICH &  
GAGLIARDI,  
/s/ FRANK HALE,  
Attorneys for Defendant.

[Endorsed]: Filed December 29, 1947.

[Title of District Court and Cause.]

MOTION FOR ORDER EXTENDING TIME  
TO FILE RECORD AND DOCKET CAUSE

Comes now the defendant through his attorneys of record and respectfully moves this court for an order extending time to file record on appeal and to docket the cause of action until the 4th day of February, 1948, on the ground and for the reason that the transcript of testimony has not yet been delivered to the defendant by the reporter of the above entitled court; that the remaining time to file record and docket cause is insufficient to afford the defendant an ample opportunity to read and review the transcript of testimony and to complete the filing and docketing thereof.

This motion is made upon all the records and files herein and upon the stipulation of the parties hereto.

GAGLIARDI, URSICH &  
GAGLIARDI,  
/s/ FRANK HALE,  
Attorneys for Defendant.

[Endorsed]: Filed December 29, 1947.

[Title of District Court and Cause.]

### ORDER

This matter coming up regularly before this court for an order extending time to file record and docket cause upon the motion of the defendant and the stipulation of the above entitled parties; and it appearing to the court that good cause has been shown for the extension of time; and it further appearing that forty (40) days has not elapsed since the filing of the Notice of Appeal;

Now, therefore, it is hereby ordered that the time for the defendant to file record on appeal and docket cause of action be and the same is hereby extended to and including February 4, 1948.

Done in open court this 29th day of December, 1947.

/s/ CHARLES H. LEAVY.

United States District Judge.

Presented by:

/s/ A. M. URSICH,

Of Attorneys for Defendant.

/s/ GEORGE T. GAGLIARDI.

Approved:

/s/ J. CHARLES DENNIS,

United States Attorney.

/s/ HARRY SAGER,

Asst. United States Attorney.

[Endorsed]: Filed December 29, 1947.



[Title of District Court and Cause.]

### STIPULATION

It is hereby stipulated and agreed by and between the above named defendant, through his attorneys of record, and the plaintiff, through its attorneys, that all of the original exhibits by the plaintiff and the defendant in the trial of the above entitled cause, whether the same were admitted or received in evidence, be forwarded by the Clerk of the above entitled Court in their original state to the Circuit Court of Appeals for the Ninth Circuit as a part of and with the Transcript of Record on Appeal.

/s/ J. CHARLES DENNIS,

United States Attorney,

/s/ HARRY SAGER,

Asst. United States Attorney,

Attorneys for Plaintiff.

GAGLIARDI, URSICH &

GAGLIARDI,

/s/ FRANK HALE,

Attorneys for Defendant.

[Endorsed: Filed December 29, 1947.]

[Title of District Court and Cause.]

MOTION FOR ORDER TO FORWARD ORIGINAL RECORDS WITH TRANSCRIPT OF RECORD

Comes now the defendant above named and through his attorneys respectfully moves the court for an order directing that all of the exhibits of the plaintiff and the defendant offered in evidence at the trial of the above entitled cause, whether or not the same were received in evidence, be forwarded to the United States Circuit Court of Appeals for the Ninth Circuit by the Clerk of the above entitled court in their original state as offered, as a part of and with the Transcript of Record on Appeal.

GAGLIARDI, URSICH &  
GAGLIARDI,

/s/ FRANK HALE,

Attorneys for Defendant.

[Endorsed]: Filed December 29, 1947.

[Title of District Court and Cause.]

ORDER TO FORWARD ORIGINAL EXHIBITS WITH TRANSCRIPT OF RECORD ON APPEAL

This matter coming on for hearing upon the motion of the defendant above named, by and through his attorneys, and the court being advised in the premises;

It is now ordered that all of the original exhibits offered in evidence by the plaintiff and the defendant at the trial of the above entitled cause, whether or not the same were admitted or received in evidence, be forwarded by the Clerk of the above entitled court in their original state to the Circuit Court of Appeals for the Ninth Circuit as a part of and with the Transcript of Record on Appeal.

Done in open court this 29th day of December, 1947.

/s/ CHARLES H. LEAVY,

United States District Judge.

Presented by:

/s/ A. M. URSICH,

/s/ GEORGE T. GAGLIARDI.

Of Attorneys for Defendant.

[Endorsed]: Filed December 29, 1947.

[Title of District Court and Cause.]

### BAIL BOND ON APPEAL

Know All Men by These Presents:

That I, John Barcott, as principal, have deposited the sum of Two Thousand Five Hundred Dollars (\$2,500.00) in cash with the Clerk of the United States District Court, Southern Division, Tacoma, Washington, for bail on appeal, and am held firmly bound unto the United States of America in the full and just sum of Two Thousand Five Hundred Dollars (\$2,500.00), to be paid to the United States of America, to which payments, well and truly to be paid, I bind myself, my heirs, executors, administrators, successors and assigns, and the said sum of Two Thousand Five Hundred Dollars (\$2,500.00), entirely by these presents.

Sealed hereinbelow with my seal and dated this 16th day of January, 1948.

Whereas, in the District Court of the United States for the Western District of Washington, Southern Division, in the case pending in said court between the United States of America, as plaintiff, and John Barcott, as defendant, being numbered 15845 of the records of the office of the clerk of said court, the Jury returned a verdict of guilty against the said John Barcott, adjudging him guilty as charged on Counts I, II and III in the Indictment in said cause, charging him with violation of 26 USC 145(b) (Income Tax evasion), and the rules and regulations thereto; and

Whereas, the said John Barcott was thereafter on the 24th day of November, 1947, duly sentenced by the court to the custody of the Attorney General of the United States, to be confined in some penitentiary designated by the Attorney General for the period of ten months, and that he pay to the United States of America the sum of \$750.00 on each of said counts, making a total fine of \$2.250.00, and that he pay the costs of prosecution to be taxed, and that formal judgment and sentence having been filed in the office of the clerk of the above entitled court against the said John Barcott; and

Whereas, the said John Barcott, principal herein, desires to appeal from such judgment and sentence so rendered in the above entitled cause against him, to the United States Circuit Court of Appeals for the Ninth Circuit; and

Whereas, the said John Barcott, principal, intends to diligently pursue all steps in prosecuting an appeal from the said judgment and sentence;

Now, Therefore, the condition of the above obligation and recognizance is that if the said John Barcott shall personally appear before the United States District Court for the Western District of Washington, Southern Division, in the city of Tacoma, Washington, from day to day and from term to term as may be ordered by the court, and then and there obey the judgment of said court and not depart from the jurisdiction of said court without leave therefrom; and shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco,

California, or such city as shall be designated by the said court for the hearing of said appeal, on such day or days as may be appointed therefor, and shall diligently prosecute the said appeal and abide by and obey all the orders of the said United States Circuit Court of Appeals in said cause and shall surrender himself in execution of the judgment or sentence appealed from, if said judgment and sentence be affirmed or the writ of error on appeal be dismissed; and if he shall appear for the trial in the District Court for the Western District of Washington, Southern Division, on such day or days as may be appointed for a retrial of said cause, and shall abide by and obey all orders made by said court and render himself in execution of the judgment of said court, then the above obligation to be void; otherwise to be and remain in full force, virtue and effect.

/s/ JOHN BARCOTT,  
Principal.

State of Washington,  
County of Pierce—ss.

On the 16th day of January, 1948, before me personally appeared John Barcott, to me known to be the individual described in and who executed the foregoing instrument, and on oath stated that he signed the same freely and voluntarily for the uses and purposes therein stated.

Witness my hand and official seal the day and year in this certificate first above written.

[Seal]        /s/ S. A. GAGLIARDI,  
Notary Public in and for the State of Washington,  
residing at Tacoma.

Approved January 16, 1948.

/s/ CHARLES H. LEAVY,  
Judge of the District Court.

/s/ HARRY SAGER,  
Assistant U. S. District  
Attorney.

[Endorsed]: Filed January 16, 1948.

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[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL

Comes now the defendant above named and hereby designates that the following listed portions of the record, proceedings and evidence be contained in and made a part of the record on appeal in the above entitled cause, to-wit:

1. Indictment
2. Court Appearance Bond
3. Motion to Dismiss Indictment
4. Motion for Bill of Particulars
5. Court Order of May 28, 1947, authorizing filing of Motion to Dismiss
6. Bill of Particulars

7. Verdict of Jury
8. All of Plaintiff's Requested Instructions
9. All of Defendant's Requested Instructions
10. Instruction No. 8 containing notation of Court in pencil, "given in part—refused in part. C.H.L."
11. Defendant's Motion for Judgment of Acquittal or in the Alternative for a New Trial
12. Judgment and Sentence
13. Notice of Appeal
14. Stipulation to Extend Time in Which to File Record on Appeal
15. Motion for Order Extending Time to File Record and Docket Cause
16. Court Order of December 29, 1947, Extending Time to File Record and Docket Cause
17. Stipulation to Forward Original Exhibits
18. Motion for Order to Forward Original Records of the Transcript of Record
19. Court Order of December 29, 1947, to Forward Original Exhibits with Transcript of Record on Appeal
20. Bail Bond on Appeal
21. Reporter's entire transcript of testimony and proceedings
22. Transcript of all Docket entries
23. Journal record covering following dates:
  - May 19, 1947
  - September 25, 1947
  - October 30, 1947
  - October 31, 1947



November 3, 1947

November 24, 1947

24. This Designation of Portions of Record to be Contained in Record on Appeal
25. All exhibits offered or received in evidence.

GAGLIARDI, URSICH &  
GAGLIARDI and  
FRANK HALE,  
Attorneys for Defendant.

Receipt of true copy of within and foregoing Designation hereby acknowledged this 19th day of January, 1948, at Tacoma, Wash.

/s/ J. CHARLES DENNIS,  
United States Atty.  
D. Bryant.

[Endorsed]: Filed Jan. 19, 1948.

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[Title of District Court and Cause.]

TRANSCRIPT OF DOCKET ENTRIES

1947

- May 13—Filed Indictment—(Cash bail, \$2500)
- May 13—Ent. order for B.W., bail set at \$2500
- May 13—Issued B.W.
- May 14—Filed Bond (\$2500 cash)
- May 14—Ent. order Indict. published
- May 14—For Arr. May 15
- May 14—Filed Ret. B.W.

1947

May 15—Arr. passed to 5/19

May 19—Deft. in Court with Counsel

Ent. arr. &amp; plea "Not Guilty"—Set for trial June 24

May 28—Filed Mot. Dis. Indict.

May 28—Filed Motion for Bill of Particulars

May 28—Filed &amp; Ent. Order authoriz. filing Mot. Dis.

July 1—Trial Oct. 14—Jury

Sept. 24—Filed Pltf's Memo. on Deft's Mot. for Bill of Part.

Sept. 25—Ent. rec. hear. Deft's Mot. for Bill of Partic. &amp; Mot. to Dis. Indict.—Mot. Dis. den.; Mot. for Bill of Partic. allowed; on Court's Motion trial reset for Oct. 30

Sept. 30—Filed Bills of Particulars

Oct. 23—Filed Praeipie U. S.—Issued Subp. d. t. (5)

Oct. 24—Order for issuance subp. ret'ble on 10/29

Oct. 24—Filed 2 Praeipie U. S.—Issued 1 Subp. d. t. &amp; 2 subp.

Oct. 28—Filed 2 Praeipie U. S.—Issued 2 Subp. d. t.

Oct. 29—Filed Marshal's Return—2 Subp. d. t.

Oct. 30—Filed Marshal's Return—7 Subp. d. t.

Oct. 30—Ent. record trial commenced (jury)

Oct. 31—Ent. record trial resumed—Filed Ret. Subp.

Nov. 3—Ent. record trial resumed

Nov. 3—Filed &amp; Ent. Verdict "Guilty Cts. 1, 2 &amp; 3"

1947

- Nov. 3—Deft. enlarged present bail pend. Mot.  
New Trial
- Nov. 3—Filed Pltf's Requested Instructions —  
Deft's Requested Inst. (2)
- Nov. 5—Filed Mot., deft. for Judgm. of Acquittal,  
or alt., Mot. New Trial
- Nov. 17—Ent. Order, Mot. deft. counsel, Mot. New  
Trial passed to 11/24
- Nov. 24—Deft. in Court with Counsel  
Ent. record hearing Mot. for Directed  
Verdict & for New Trial—denied
- Nov. 24—Filed & Ent. Judgment & Sentence: 10  
mos. impris. (concur. on Cts. 1, 2 & 3);  
fine \$750 on each of Cts. 1, 2 & 3
- Nov. 25—Filed Notice of Appeal
- Nov. 26—Cert. cop. Notice of Appeal & Statement  
of Docket Entries sent CCA. Notice of  
above sent counsel & Judge
- Dec. 2—Filed Cost Bill, U. S. (\$125.34)
- Dec. 27—Filed Stip. ext. time file appeal—Filed  
Mot. ext. time (to 2/4/48)
- Dec. 27—Filed Stip. transmit orig. exh.—Mot.—  
Order transmit. orig. exhs.
- Dec. 31—Filed Reporter's Transcript (2 copies filed  
1/19/48 for appeal)

1948

- Jan. 16—Filed Bail bond on appeal (\$2500 cash)
- Jan. 19—Filed Deft's Designation of Contents of  
Record on Appeal

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT  
OF RECORD ON APPEAL

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing transcript, consisting of pages numbered 1 to 59, inclusive, together with the original Reporter's Transcript of Testimony and Proceedings, consisting of pages numbered 1 to 523, inclusive, and Plaintiff's original exhibits numbered 1 to 12 and 14 to 21, inclusive, and Defendant's original exhibits numbered A-1, A-2 and A-3, is a full, true and correct record of so much of the papers and proceedings in Cause No. 15845, United States of America, Plaintiff, vs. John Barcott, Defendant, as required by Defendant's Designation of the Contents of Record on Appeal, on file and of record in my office at Tacoma, Washington, and the same constitutes the Transcript of the Record on Appeal from the Judgment and Sentence of the District Court of the United States for the Western District of Washington, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the original Transcript of Testimony and Proceedings and the original exhibits above referred to have this day been transmitted to the said Circuit Court of Appeals.

I further certify that the following is a full, true and correct statement of all expenses, fees and charges earned by me in the preparation and certification of the said Record on Appeal, to-wit:

Appeal fee .....	\$ 5.00
Clerk's fee for preparation of Record on Appeal .....	20.00
	<hr/>
	\$25.00

and I further certify that the said fees, as above set out, have been paid in full.

In Testimony Whereof I have hereunto set my hand and affixed the seal of the said Court, in the City of Tacoma, in the Western District of Washington, this 26th day of January, 1948.

[Seal]

MILLARD P. THOMAS,

Clerk,

By /s/ E. E. REDMAYNE,

Deputy.

In the District Court of the United States for the  
Western District of Washington, Southern  
Division

No. 15845

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN BARCOTT,

Defendant.

### TRANSCRIPT OF PROCEEDINGS

Be It Remembered that on the 30th day of October, 1947, at the hour of 10:00 o'clock a.m., the above entitled and numbered cause came on for trial before the Honorable Charles H. Leavy, one of the judges of the above entitled court, sitting in the District Court of the United States at Tacoma, Pierce County, and State of Washington; the plaintiff appearing by Allan Pomeroy, Assistant United States Attorney, and the defendant appearing in person and by Messrs. S. A. Gagliardi and Anthony M. Ursich of Gagliardi, Ursich & Gagliardi, and Frank Hale; both sides having announced they were ready for trial, a jury was duly empaneled and sworn to try the cause; and

Whereupon, the following proceedings were had and done, to-wit: [4\*]

Mr. Pomeroy: If the Court please, counsel, ladies and gentlemen of the jury, I noticed at the

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\* Page numbering appearing at foot of page of Reporter's certified Transcript of Record.

time that the Court was giving questions to you that practically none of your had any jury experience.

So at this time I would like to say that the attorneys are given the opportunity at the opening of the case to outline to you what they think the evidence will show, and how they hope to prove their side of the case. And at this time the Government has the privilege of making what we term an opening statement. And in this statement I hope to advise you of what I think the Government witnesses will testify to, and so that you may be looking for those things in the testimony and refer back to the indictment.

Now, as the Court explained to you, an indictment was returned by a grand jury in this case. Now this indictment—the original indictment will go to the jury room with you. It is not evidence in itself. However, it is only the paper charge upon which the Government charges a man with a crime; and it is the burden of the Government to prove beyond a reasonable doubt all of the material allegations of that indictment.

And so, in order to inform you now of what the witnesses will be testifying about and what [5] this case is about, I would like to briefly recite to you what this indictment charges the defendant is guilty of.

There are three counts in the indictment. And these three counts refer to three different years. It's charged in count one that "on or about the 12th day of February, 1944, at Tacoma, Washing-

ton, John Barcott, who was married during the calendar year of 1943 and had no dependents, did wilfully and knowingly attempt to defeat and evade a large part of the income and victory tax due and owing by him to the United States of America for the calendar year of 1943, by filing and causing to be filed with the Collector of Internal Revenue at Tacoma, Washington, a false and fraudulent income and victory tax return, wherein he stated that his net income for said calendar year, computed on the community property basis,"—that is that—you will find is true during all three counts, that is, 1943, 1944 and 1945. that he took his net income and then divided it between John Barcott and Katie Barcott, his wife, so that his income was computed on the community property basis, that is, he reported half of it and his wife reported half of it. His wife's returns are not an issue in this case at all; it is only John Barcott's [6] returns. And he stated in this particular return, in the first count, "that his income was the sum of \$6,720.40, and that the amount of tax due and owing thereon was the sum of \$1,545, and some cents; whereas, as he then and there well knew, his net income for the said calendar year computed on the community property basis was the sum of \$12,406.33, derived as follows: that is, in his gross income he received dividends in the sum of \$140, plus interest in the sum of \$141.93, interest on bonds in the sum of \$200, income from business \$24,621.96, making a total of \$25,103.89. The deductions, contributions



he made of \$200, taxes of \$91.23, making a total of \$291.23 in deductions, leaving him a net income of \$24,812.66 of which his one-half community share was \$12,000—about—\$12,406.33, upon which said net income he owed to the United States of America an income and victory tax of \$3,645—forty-six dollars and twenty-five cents.”

Now that is the sum and substance, the material facts of count one. Now count—and deals with the calendar year of 1943. Count two charges, using practically the same language, a violation on the 13th day of February, 1945, at Tacoma, of a violation of filing an income tax for the calendar year of 1944, in which he [7] stated that his net income was \$5,632.57; whereas the Government's charge is that his net income was \$9,926.61, still bearing in mind that is half of the community income.

Count three charges the same thing for the year 1945, that is, the calendar year 1945, when he reported the sum of \$7,388.98; whereas, the Government charges that his income was, his share was \$11,138.92, which is half of the community income of the parties.

This case, when it will be—when it is finally presented to you, will be classed what we term a case proven by the net worth process; that is, in finding out what a man owns at the beginning of any particular year and then checking that against what he owns at the end of that particular year, and by that deducting from it what his expenses or what other income he may have had to find what his true income is; that is, a man has so much at the begin-

ning of the year and he had so much at the end of the year. And then you give him credit for everything that he can claim in between, and the difference between the net worth at the end of the year and the net worth at the beginning of the year, is what the Government claims his income must have been. [8]

The first witness for the Government will be a Special Agent for the Internal Revenue Service, and his testimony, I believe, will show you that he received the information that the—John Barcott had gone to the bank and traded a whole bunch of small denominational bills for ten one-thousand-dollar bills, which was—being an unusual transaction, he was sent to check on John Barcott about.

And so he went to see John Barcott and was told by John Barcott that it was his custom to save up small denomination bills and then to purchase United States Savings Bonds with these bills, his main business being the California Oyster House here in the City of Tacoma. And he said that the reason he had taken—gotten the cash of ten one-thousand-dollar bills was because he was going to make a loan to someone and that was the purpose of changing the bills into these ten one-thousand-dollar bills.

He was asked at that time if he had any objection to the Special Agent for—of the Revenue Service of showing him what he had in the way of these bonds and these bills, and he said no, that he kept everything in a safe deposit box and he would

take the [9] agent down there. So, the agent went down to the safe deposit box with Mr. Barcott. The money—the cash money was not in the safe deposit box, but he had it in an envelope—in two envelopes in his pocket, and the safe deposit box was then inventoried by the Special Agent for the Revenue Service, Mr. Neilson.

And in this safe deposit box was found some seventy-four or seventy-five thousand dollars worth of United States Savings Bonds, all of which, or most of which had been purchased in the past three years. This conversation of which I am telling you now, took place in the early part of 1946. And when the money counted in the envelope—was counted in the envelope, it was found that it was twenty-thousand dollars instead of ten-thousand dollars, and Mr. Barcott told the agent at that time that he didn't understand that, that he thought it was only ten thousand but he had twenty thousand dollars in one-thousand-dollar bills.

So the total amount that was then left in the box when the agent and Mr. Barcott left there, was the sum of—there was three thousand dollars more besides that in small denomination bills, so that's twenty-three thousand dollars in cash and some [10] seventy-four or seventy-five thousand dollars in United States Savings Bonds.

Then, after a report was made back to the Internal Revenue Service, Mr. Swanson was notified concerning this matter and was to audit the account of Mr. Barcott: and some few days later Mr. Swan-

son and Mr. Neilson together saw Mr. Barcott and again went and checked the contents of this safe deposit box, at which time Mr. Barcott told them, upon questioning, that he—yes, he had another safe deposit box over in another place. So they then went over to this other safe deposit box and found that there was nothing in this other safe deposit box except business papers, that is, insurance papers on his business properties.

The other witnesses are people who will come in and bring in certain records, that is, records of his savings accounts at the National Bank of Washington, his checking accounts, the records of entry into the safe deposit box there at the National Bank of Washington, a real estate contract, and a conditional sales contract that Mr. Barcott owned.

Also, there will be a witness who will testify as to dividends that he received from the Fishermen's Packing Corporation stock, which he owned, [11] of some fourteen hundred dollars. Then there will be an insurance man who will testify as to some two hundred and thirty dollars worth of—I think it is two hundred and thirty dollars a year premiums he paid on life insurance policies.

Then Mr. Swanson will take the stand, and Mr. Swanson will compute for you, showing the method by which we arrive at how much a man's tax should be.

Now briefly, after you get all this information in, the testimony will show that in computing the figures which I read to you in the indictment, nothing was charged against him for the \$23,000 in cash.

That was given to him as if he had saved that for a long period of years, and so he is not charged with any part of the \$23,000 in cash which he had in this box at the time that it was checked by the Internal Revenue Service.

His savings account at the National Bank of Washington, which went from \$2,279.53 in 194—December 31, 1942, to \$3,629.03 in—on December 31, 1945, shows an increase of some fifteen—fourteen hundred dollars. His checking account for the California Oyster House account, that's the main [12] business that he had, was merely used to pay out about three accounts, and this account averaged about a thousand dollars all the way through this whole period of time. He didn't use the checking account a great deal, except I think he paid three accounts out of the store out of this thousand dol—or this checking account.

And that's been about the same all the way through, the records will show that his checking account remained the same, about a thousand dollars.

But, his purchase of United States Savings Bonds increased materially, so that we find that on December 31, 1942, he owned fourteen thousand four hundred and fifty dollars worth of United States Savings Bonds, and that is not the face value of these bonds but that is the cost value, that is the value of what it cost him to purchase them. A year later, December 31, 1943, he owned thirty-five thousand two hundred dollars worth of United States

Savings Bonds, an increase of some nineteen thousand dollars, or twenty thousand seven hundred and fifty dollars. A year later, December 31, 1944, he owned fifty-four thousand two hundred dollars, an increase of some nineteen thousand dollars in United States Savings Bonds. [13] And on December 31, 1945, he owned seventy-four thousand two hundred dollars worth of savings bonds, and I believe the evidence will also show that in this check-up there was a five-thousand-dollar bond missing which is not in the indictment, but this five-thousand-dollar bond is not charged against him, which he still has, and so it should be twenty-five thousand dollars more for the last year.

And that is the main part of our charges, that this shows the income that he actually made during this period of time.

The real estate contract is credited to him, a real estate contract which was being collected by the National Bank of Washington, which at the beginning of the period, December 31, 1942, amounted to \$1,596.35, and at the end of the period was down to \$1,039.83; in other words the collection on that was some maybe five or six hundred dollars down from where it was, including interest.

There was a conditional sales contract which was also being collected by the National Bank of Washington for him; starting on December 31, 1942, the amount due and owing at that time was \$494.73, and at December 31, 1945, there was a balance due and owing [14] of some \$65.99. So that amount, some



three hundred dollars—four hundred dollars was—four hundred and some dollars was paid during this period of time and he was given credit for that.

In computing the net worth we—everything was—we attempted to put everything in and I think the evidence will show that he has a home and furnishings, the same home and furnishings that he had at the beginning of the period of time, and that was valued at \$8,000 and it was valued at \$8,000 right straight through, so that doesn't change the result either.

The business fixtures were charged—we took his own figures on the business fixtures. They were, December 31, 1942, of \$3,815.90, and then he says himself that he increased that \$1,109, so he was given credit for having spent \$1,109 for business fixtures.

He was given credit for the Fishermen's Packing Corporation stock which he owned, of some fourteen hundred dollars. That remains the same. He had that all during the period of time.

Then he owns Lots 3 and 4 of Block 9729, of Tacoma Sixth Addition, which were valued at \$3,150 at the beginning of the time, and the same value at the end of the time. So that in no way affects the proposition. [15]

Then he purchased for \$750, Lots 19 and 20 in another block, and sold it during the time, so he was given credit on the \$750, making his total assets jump from the beginning of the indictment, \$59,186, till the end of the time of indictment of \$120,409.75.

That of course is broken down and will be broken down for you by the Revenue Agent into years, that is, during—his total assets at the beginning of the period, \$59,186.51; at the end of the first year his assets were \$81,933.24; and at the end of the next year was \$101,063.41; and at the end of the period, December 31, 1945, was \$120,409.75.

Then he was given a credit, less reserve for depreciation, which he put in, and we took his figures on that. So that in no way affects the original statement that I made.

To this was added his life insurance premiums paid, and his Federal income tax paid as he reported it and as he paid it. So that we arrived at the figures which I read to you from the indictment; and as the evidence will—is shown to you, there were no charges then made for any living expenses whatever. I mean, it cost him nothing to live during this period of time. If those were figured in, why it would be more. But, he was not charged with any of those things whatever. [16]

And after these facts are given to you, the Government is then asking for you to bring in a verdict of guilty on all three counts of this indictment.

The Court: Do you desire to make your opening statement now, Mr. Ursich?

Mr. Ursich: No, your Honor, we will reserve it until later.

The Court: You may call your first witness.

Mr. Pomeroy: Mr. Nielsen. [17]



STANLEY NIELSEN

produced as a witness on behalf of the Government, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Pomeroy:

Q. Please state your name to the Court.

A. Stanley Nielsen.

The Court: What is your first name again?

The Witness: Stanley.

Q. You may spell it for the Court.

A. S-t-a-n-l-e-y.

Q. I mean your last name.

A. N-i-e-l-s-e-n.

Q. And what is your occupation, Mr. Nielsen?

A. I am employed by the Bureau of Internal Revenue as a special agent in the Intelligence unit.

Q. And how long have you worked for the Government?      A. About five years.

Q. Do you know John Barcott, the defendant in this case?      A. Yes, I do.

Q. When did you first become acquainted with him?      A. January 28th, 1946.

Q. And what was the occasion of that date?

A. I called Mr. Barcott to discuss an official assignment [18] that I had concerning a cash transaction, wherein he purchased ten thousand one-dollar bills, with bills of ordinary denomination.

Q. Did you then have a meeting with Mr. Barcott?      A. I did.

(Testimony of Stanley Nielsen.)

Q. Where was that meeting?

A. At room 1700 Puget Sound National Bank Building.

Q. He came there in response to your call?

A. That's right.

Q. And did you discuss this matter with him?

A. I did.

Q. Just state what that discussion was.

A. I told Mr. Barcott the purpose of investigating such transactions was to determine if the money was used in black market activities, and if the money was properly reported for income tax purposes, and he said "Well," he said, "I have always filed income tax returns in the operation of my restaurant, and I ordinarily accumulate five or six thousand dollars, and purchase United States Savings bonds," but the particular transaction we were talking about, he said "I accumulated the ten thousand dollars to make a loan to a friend who is going to buy a boat, one Mike Kazulan. However, the transaction did not materialize so I now I have the ten thousand dollars."

Q. Then what happened? And what was said?

A. He said that: "If you wish I will show you the ten thousand dollars and the bonds that I have, to show you that I am telling you the truth about this matter." I asked him where he kept the bonds and the money, and he said "In the safe deposit box, and if you want to meet me down at the bank, I'll get the key and take you down and show it to you," so I agreed to that, and we met at the bank—

(Testimony of Stanley Nielsen.)

proceeded down to the bank, to the vault, and where he obtained the box.

Q. Just you and he were together, is that right?

A. That's right.

Q. All right. Then you went down to the safe deposit box, and what occurred down there?

A. We went into the vault and he obtained his safe deposit box and we retired to a small room where he placed the box on the table and opened it.

Q. Then what happened?

A. Then he placed two packages of bills near the box—near the open end of the box, and he said “Nielsen, this is the money that we have been talking about.”

Q. Where did he take the package—or the money? Was that from the box, or where did he have it?

A. He didn't take it from the box. He removed it from his person.

Q. Two envelopes, were there? [20]

A. No, there were two packages, with a rubber binder around each.

Q. Did you inventory those two packages?

A. I did.

Q. And what was in those two packages?

A. They were marked in large letters five thousand, each. The packages each contained ten one thousand dollar bills.

Q. In other words they were marked five thousand each, but they each contained ten thousand dollars?

A. That's right.

(Testimony of Stanley Nielsen.)

Q. The two packages then contained twenty thousand dollars, in one-thousand dollar bills?

A. That's right.

Q. And what else did you—did you further inventory the box at that time?

A. Yes. When I observed the twenty thousand dollars, I said, "Barcott there is twenty thousand in place of ten," and he said, "Well," he said, "I must have made a mistake." Then I continued to inventory the contents of the box. It contained six packages of currency, five hundred dollars in each in ordinary denomination.

Q. How much was that in cash, then?

A. Three thousand dollars.

Q. Three thousand dollars. There was twenty-three thousand dollars in cash, is that correct? [21]

A. That's right.

Q. What else did you see there?

A. The box had bonds in it, and I began to inventory the bonds.

Q. Did you inventory the bonds? A. Yes.

Q. Did you make a list of these bonds?

A. I did.

Q. And how much did they amount to, the bonds that you inventoried in that box?

A. As I recall, about seventy-five thousand dollars.

Q. That was the face value of the bonds?

A. Yes.

(Testimony of Stanley Nielsen.)

Q. And tell what other conversation if any took place while you were there?

A. While I was counting the currency, Barcott said, "Here, Nielsen"—that was when I was counting the three thousand dollars—the six packages containing five hundred each, "Here, Nielsen, let me give you one of these, you——"

Mr. Ursich: Your Honor, please—just a moment. I would like to interrupt the witness and ask that an offer of proof be made in this regard to the Court in the absence of the jury, on some information that we have learned from the agents, we anticipate that it may be a matter that may be prejudicial at this time. [22]

The Court: No, I shall deny your offer at this time. If you want to challenge the relevancy of the testimony the witness has to give, you may do so.

Mr. Pomeroy: Read the last question.

The Reporter: "Q. And tell what other conversation if any took place while you were there. Answer: While I was counting the currency, Barcott said, 'Here, Nielsen'—that was when I was counting the three thousand dollars, the six packages containing five hundred each, 'Here, Nielsen, let me give you one of these——'" and you were interrupted.

The Witness: That's right. Barcott said, "Here Nielsen, let me give you one of these," and pushing a package of currency containing five hundred dollars to me, and, "You make a favorable report on this matter and just forget about the whole thing," and I told him, "No, Mr. Barcott, I can't do

(Testimony of Stanley Nielsen.)

that. I must inventory this stuff," so I continued to inventory the bonds.

Then he approached me again. He said, "Now, Nielsen," he said, "—we are alone—only two of us." He said, "Can't you take a package of this and make a favorable report on it?" I said, "No. By your actions you are practically walking into jail. It is my duty to inventory this now," so I continued and inventoried it and he approached me again, and he said, "I feel sick inside." [23] He said, "Let me buy you a suit of clothes, and your wife a fur coat, and you take this money and make a favorable report on me." I again told him that I couldn't and wouldn't accept anything from him, and continued inventorying the bonds. After the inventory I told him, "Now," I said, "replace your possessions—your bonds and your cash and miscellaneous papers in your box and put them back in the vault." He picked up two handfuls of currency and got in front of me, and he said, "For God's sake, take some of this, so that I can sleep nights." I said, "No, I can't take any of it. Put it back in your box, and put your box back in your vault. If we desire further information on this matter, why we will contact you again, and just go on about your business," which he done. He left the vault. He returned the box to the vault, and we walked out of the bank together.

Q. When did you next see Mr. Barcott?

Mr. Ursich: Your Honor please, at this time I am asking that that testimony be stricken and the jury instructed to disregard it, on the grounds and

(Testimony of Stanley Nielsen.)

for the reason that the matter is irrelevant to the trial of the issues in his case.

There has been no proper predicate laid for its introduction. Furthermore, there has been no evidence—no corpus of any kind committed here. The only purpose for [24] which it can be offered is to prejudice the minds of the jury against the defendant at this time.

The Court: The objection will be overruled, and motion denied.

Q. When did you next see Mr. Barcott?

A. I believe it was on February 13th.

Q. And of what year was that? A. Of '46.

Q. And what was the occasion of that visit?

A. Mr. Swanson, Revenue agent, had been officially assigned to make an audit in this matter, and we again called Mr. Barcott, and he came to Swanson's office and discussed the matter with him.

Q. And did you have a conversation with him at that time? A. Yes, we did.

Q. Where did you go after you had this discussion with him in Swanson's office?

A. Barcott agreed to show us the contents of his safe deposit box for re-inventory, and Swanson, Barcott and myself went down to the box and re-inventoried it.

Q. Did the box have the same contents on this occasion as it had on the occasion in which you had inventoried it before?

A. Yes. That was verified by Mr. Barcott and Mr. Swanson.



(Testimony of Stanley Nielsen.)

Q. Was there then a conversation concerning another safe [25] deposit box?

A. There was.

Q. And what was that conversation?

A. We asked him if he had another safe deposit box, and he said yes, he had one with the Washington—at the Washington Building.

Q. And what occurred then?

A. We went over to the Washington Building, and he made available the contents of that box.

Q. And what was in that box?

A. Some miscellaneous insurance papers—insurance on his business, the California Oyster House.

Q. No cash or bonds?

A. That's right, no cash there.

Q. What was the date of this first occasion you went to this National Bank of Washington box?

A. Barcott and I?

Q. Yes. A. It was January 28th, 1946.

Q. January 28th, and the second occasion was February the 13th, is that correct?

A. That's right, I believe.

Mr. Pomeroy: You may inquire. [26]

#### Cross-Examination

By Mr. Ursich:

Q. Mr. Nielsen, you say you saw Mr. Barcott for the first time on the 28th of January in 1946?

A. I believe that is right, sir.



(Testimony of Stanley Nielsen.)

Q. He came over to your office at your request, is that right?

A. I think I called at his place of business just prior to that, and left the telephone number where he could reach me, as near as I recall, and I believe that he called me. It might have been that I called him. I don't remember exactly.

Q. But any way, he came up there at the request of the Internal Revenue, is that correct.

A. Yes.

Q. At that time you informed him you had some knowledge about ten thousand dollars that he had received from one of the banks, is that right?

A. That's right.

Q. Did he deny that fact at all?

A. He did not.

Q. And you told him you were investigating that ten thousand dollars with reference to Internal Revenue matters, black market or some similar matter?

A. Uh-huh. [27]

Q. Did you at that time ask him where that money was?

A. I think he voluntarily told me, as I recall it.

Q. Would you want to say for sure that that was the way, or could you have been mistaken on that?

A. I recall of asking if he had the money.

Q. Do you remember asking him whether or not you could see where the money was?

A. I don't believe that I did. I would say "no" to that.

(Testimony of Stanley Nielsen.)

Q. In other words, this was voluntary, according to your testimony, by Mr. Barcott?

A. That's right.

Q. And he didn't make any effort at that time to conceal any of his transactions?

A. No, he didn't.

Q. He told you he had the box, and he said it was down there?      A. Yes.

Q. And all these assets were there. That was purely voluntary on his part, is that right?

A. That is correct.

Q. Now all this occurred on the 28th. How long was he in your office before he left to get the key for the box?

A. I think, as near as I can recall, he came there about 10:00 or 10:30 in the morning, and after having been down to the bank, I know by the time I got back to the [28] Revenue agents' office it was 12:35.

Q. And he was up there how long then, would you estimate?      A. Probably 45 minutes.

Q. About that time, and you informed him—or the purpose of your interview was to inquire into the ten one-thousand dollar bills?

A. I told Mr. Barcott the purpose of the interview—of investigating such transactions, was to determine if they were in any way connected with black market activities or income tax evasions.

Q. At that time.      A. Yes, sir.

(Testimony of Stanley Nielsen.)

Q. And there wasn't any attempt made on his part to conceal this or deny it. He told you that it was true. He told you where you could go and see it?

A. Yes, that's right.

Q. Had you advised Mr. Barcott at that time he didn't have to show you the box if he didn't want to? A. I did, yes.

Q. And notwithstanding that fact he insisted on showing you——

A. That's right, he said, "I will show you that I am telling the truth."

Q. Now you wouldn't have had any right to go into that box without his permission, would you?

Mr. Pomeroy: I will object to that, if the [29] Court please, as calling for——

Q. In your conversations with Mr. Barcott how did you find his use of the English language? Would you say that he spoke well, or would you say he was difficult to understand?

A. He spoke well enough for me to understand him.

Q. He spoke well enough. Did he speak broken, or did he not speak broken?

A. I will say that he speaks a little bit broken.

Q. A little broken?

A. He can carry on an intelligent conversation.

Q. I am referring to his actual use of the English language. He spoke with a definite broken accent, is that right?

A. Some words probably broken; some of them rather clear. I am not a language expert.

(Testimony of Stanley Nielsen.)

Q. I understand that. You say then that you had no difficulty?

A. Well, I can understand the English language, yes.

Q. And you had no difficulty at all, in understanding him?

A. Well, no, I would say that I didn't have any difficulty in understanding.

Mr. Ursich: No further cross-examination.

Mr. Pomeroy: You may step down.

(Witness excused.) [30]

Mr. Pomeroy: If the Court please, at this time it's close to the noon hour, and I'll have these marked, and I think we can use up this time in getting these exhibits——

The Court: They may be marked.

Mr. Pomeroy: I offer Plaintiff's Exhibits 1, 2, 3, 4, 5, and 6.

The Court: Is there any objection?

Mr. Ursich: No, your Honor, they are properly authenticated, and I see no reason objecting to their introduction if we know what the purpose is.

We have no objection, your Honor, if that covers the testimony that is offered. We will reserve an objection if it is not coupled with testimony, however.

The Court: They will be admitted in evidence with the reservation that has just been made.

(Whereupon, documents referred to were received in evidence and marked Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5 and 6, respectively.)

The Court: Let me ask counsel if you have some matters that you want to present to the Court in the absence of the jury?

Mr. Ursich: Your Honor, please?

The Court: You suggested here when the [31] direct examination of the witness was taking place that you had some objection that you wanted to present in the absence of the jury.

Mr. Ursich: Yes, your Honor, it was with reference to that testimony.

The Court: The jurors will now be excused until 2:00 o'clock this afternoon. It's of great importance that we be prompt in the matter of being here when we reconvene court, so make it a point to get here a little before 2:00 o'clock. You can assemble before you come into court.

The audience will remain seated and the court will remain in session, because I have some other matters to take up.

The jury will be excused.

(Whereupon the jurors retired from the court room.)

Mr. Gagliardi: If your Honor please, at this time the defendant moves the Court to withdraw from the consideration of the jury the testimony given by the witness Nielsen with reference to the attempted bribe, and to instruct the jury to disregard it.

The testimony was highly prejudicial, and yet it did not prove an issue here. We are proving one crime in order to convict the defendant of [32]

another crime. If it was in aid of the proof of the crime the defendant stands charged with, then it would be competent, but that testimony, highly prejudicial, poisoned the mind of the jury and convinced the jury that this man has committed a crime of attempted bribery which is a felony and a severe offense.

Now how are we going to have the jury's mind dissuaded from the poison? We are charged here with having defrauded the government of payment of taxes, and not that we have attempted to bribe an agent of the government, and by the fact that you are proving one crime which is so severe and so poisonous—the very poison will poison any person's mind; when attached to the agent of the government, the jury should be free of that poison, and they should judge this case upon the facts as they are, and that is, they must judge whether or not this defendant reported all his income or he didn't. Even an honest man, not having committed a crime, can make that kind of a mistake by reason of his fear, excitement, and scared in his own condition, and to poison the mind of the jury to bring that testimony. That conversation did not prove either that the defendant had paid or not paid the taxes, except for one purpose, and one purpose alone, and that it was to poison the minds of the jury, and the jury should not be [33] poisoned in that manner. The offense we are charged with here is severe enough without adding another felony on top of it, and if we proceeded further, possibly two or

three other felonies that this defendant may have committed, in order to convict him of non-payment of taxes.

I sincerely say, your Honor, that the testimony was incompetent, highly prejudicial—it was very poisonous and should be withdrawn from the consideration of the jury, and the jury instructed to disregard it.

The Court: The charge here, Mr. Gagliardi, is that the defendant fraudulently sought to evade the payment of his income tax. The evidence is material to such a charge. If, as the government contends he was guilty, it would tend to establish guilty knowledge. If there was an effort made to induce the government agent to refrain in the performance of his duty, the evidence is highly material, and very competent to the issues. Whether the jury believes it or not—and if they do believe it, it still doesn't prove the ultimate fact, but it bears strongly upon the question of fraud that must be established by the government here beyond a reasonable doubt. If this income tax return is false and not fraudulently made, why of course——

Mr. Gagliardi: That is our contention, your [34] Honor, that they must prove first that fraud was committed, and then a guilty conscience of having committed it, it may be offered for that purpose.

The Court: The order of proof would not make the evidence incompetent. Of course, if there is no proof to support the major charge, why the whole case would fall.

Mr. Gagliardi: Well, if your Honor please, the testimony of the witness also was there was two



investigations. One was for the purpose of determining to see whether or not the man had paid all the income tax. The other was, whether or not he was operating a black market. Now which of these crimes was he trying to atone? Was he atoning for a black market, or was he trying to atone the payment of taxes? And there was also the crime of hoarding the money—large bills, which some of us have in mind if they were gold certificates, and yet we are charged here with guilty conscience of having evaded the payment of taxes, when the witness himself has said, “We are investigating possible operations in black marketing,” which was also a crime, or possibly, evading the payment of taxes. Now which of these two was the defendant conscience guilty? Was it the black market, or was the non-payment of taxes, and that’s why I say it is highly prejudicial. We are tried [35] here with three crimes in one indictment, without being segregated—without being charged, as a matter of fact.

The Court: Well, I don’t know of your third crime that you mentioned, Mr. Gagliardi. I know of no public offense being committed by a person for having ten thousand dollars of bills in their possession.

Mr. Gagliardi: Your Honor, there was an edict of the President of the United States where they called all the gold certificates and some of us were ignorant of money and never seen any. We don’t know the difference between gold certificates and large denominations.

The Court: I will have to assume these were not gold certificates. The banks were surely not en-



gaged in handing out gold certificates, because gold certificates have been called in. The question as to whether the defendant thought he was being investigated for black market operation or for a violation of the income tax law is a little more to the point on your contention, but the evidence here is that he was advised this was an Internal Revenue Agent and not an O.P.A. investigator, and in the light of the evidence as to the nature of the inquiry being made at the time by the agent, I shall have to hold that his testimony is [36] relevant and the question is for the jury to determine whether they believe it or not, and whether it tends to establish the fraudulent evasion of income tax as charged in the indictment.

Your motion to strike will have to be denied, Mr. Gagliardi, and an exception allowed.

The court will now be at recess until 2:00 o'clock this afternoon.

(Recess.) [37]

January 20, 1948

2:00 P.M.

### SPARKS WASHBURN

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Pomeroy:

Q. Please state your name.

A. Sparks Washburn, Assistant Cashier of the National Bank of Washington.

(Testimony of Sparks Washburn.)

Q. And as Assistant Cashier, are you custodian of the records there? A. I am.

Q. May I have the records that you have?

A. You want them all?

Mr. Pomeroy: I was trying to get on to your procedure here, Judge. I didn't know whether he was to take them to the Clerk or not.

The Clerk: Plaintiff's Exhibit No. 7, for identification.

Q. The bailiff is handing you what is marked for identification as Plaintiff's Exhibit No. 7. Will you please state to the Court what that is, if you know.

A. This is the checking account of the California Oyster [38] House, for the period January 1, '43 through December 31, 1945, taken from our original records and certified.

Q. And, hand them to the defense counsel.

The Clerk: Plaintiff's Exhibit No. 8, for identification.

Q. The bailiff is handing you what is marked for identification as Plaintiff's Exhibit No. 8. Will you state to the Court what that exhibit is, if you know?

A. This is the savings account of John Barcott, 930 Pacific Avenue, No. 64787, beginning with the date February 9, '37 through October 1, 1947. This is the original record.

The Clerk: Plaintiff's Exhibit No. 9, for identification.

Q. The bailiff is handing you what is marked for identification as Plaintiff's Exhibit No. 9. Will you explain to the Court what that is, if you know?

(Testimony of Sparks Washburn.)

A. This is the record of two contracts, real estate contracts, a payment record in which Anton Barcott apparently purchased certain property from John Barcott on the real estate contract.

Q. Is there a conditional sales contract there also?

A. Well, the contract, the original conditional sales contract is not here. It's simply recorded. It was [39] part of the original documents.

Q. Is that an original record?

A. Yes, it is.

The Clerk: Plaintiff's Exhibit No. 10, for identification.

Q. The bailiff is handing you what is marked for identification as Plaintiff's Exhibit No. 10. Will you explain to the Court what that is, if you know?

A. These are original entrance tickets into our safe deposit vaults, Box No. 3064, dated, one of them, January 28, 1946, 10:55 a.m.; and February 13, 1946, 1:34 p.m.; both tickets representing entrance to the box of Mr. Barcott.

Q. Mr. Barcott signed those did he?

A. Yes, he did. Both tickets.

Mr. Pomeroy: If the Court please, at this time I'll offer Plaintiff's Exhibits Nos. 7, 8, 9 and 10. They may say that number seven is a copy of an original, but it was found that there were about thirty-six big volumes that were nailed together at the bank, and it would be necessary to tear these thirty-six big volumes apart in order to bring the originals here, and counsel for the defendants generously agreed that I may bring the copies here.

(Testimony of Sparks Washburn.)

The Court: And these original records of the bank of course will be subject to withdrawal and copies substituted later if necessary, if they are admitted. Do you have any objection to the admission?

Mr. Gagliardi: I would like to ask the witness a few questions before it may be admitted. There may be something else that should be added, your Honor.

Mr. Washburn, referring to Exhibit No. 7, I see the date that you have here, the first bank transaction is January 1st of '43. Is that the inception of open this account, or was this account opened before that date?

The Witness: Oh, it was open long before that.

Mr. Gagliardi: And how long before that was it open?

The Witness: Oh, I think Mr. Barcott has banked with us ever since I've been there. I would say twenty years, anyway.

Mr. Gagliardi: Twenty years. Then this only reflects bank transaction from January 1, '43 to January 1, '46.

The Witness: Well, December 31——

Mr. Gagliardi: December 31st. [41]

The Witness: ——'46.

Mr. Gagliardi: '46.

The Witness: Ah, '45, pardon me.

Mr. Gagliardi: '45.

The Witness: Huh, we'll get it yet.

(Testimony of Sparks Washburn.)

Mr. Gagliardi: I am meaning to say the beginning of the year 1946, it does not include the year.

I object to that, your Honor. If the jury is going to have the benefit of this man's bank transaction, they should have all the record of that bank.

The Court: The objection on that ground will be overruled. If you want to go back a year or two, or three, if they become relevant to the issue. The years involved here are '43, '44, and '45.

Mr. Gagliardi: I realize that, your Honor, but we are charged here with net worth, according to the statement made to the jury. If we can, if the record are there, they should be present—

The Court: I don't care to argue the matter, Mr. Gagliardi. I will give you permission, if you want the witness to produce the record for a number of years preceding. No need of bringing them all. [42] because 20 years ago would have little bearing on what occurred three years ago, or four years ago, but that does not make these documents irrelevant.

Mr. Gagliardi: It seems to me, your Honor, that the—well, I don't want to press my—your Honor has overruled my objection on the ground that it is not a complete record. It is not correct and complete as they are. I am objecting on the ground—

The Court: Objection will be overruled.

Mr. Gagliardi: —and that ground alone. Note an exception.

The Court: Now what about the others?

(Testimony of Sparks Washburn.)

Mr. Gagliardi: Now, turn to exhibit number nine. Does this represent the inception of the open of this account? I refer to the contract, the conditional sale contract.

The Witness: If that's the real estate contract, that's so, yes. Inception of the contract.

Mr. Gagliardi: And the inception of the contract is what date?

The Witness: Well, it was apparently left with us on February the 9th, 1937, both of these real estate contracts.

Mr. Gagliardi: And payable at what monthly rate? [43]

The Witness: Well, let's see, payable at the rate of—the monthly rate—it's apparently not stated, the payments varied.

Mr. Gagliardi: Does that payment show any irregularity of payment on that record, do you have any other record in which you give us more information?

The Witness: On this contract No. 1803B, the amount of each installment was to be ten dollars—let's see—oh yes, and the amount—it's stated here, Mr. Gagliardi, and the—on contract No. 1803A the payments were twenty dollars.

Mr. Gagliardi: Twenty dollars.

The Witness: That's right.

Mr. Gagliardi: Is the payment made steady, or made occasionally, according to the record?

The Witness: They were apparently made pretty close to a schedule on a monthly basis.

(Testimony of Sparks Washburn.)

Mr. Gagliardi: And the bank kept the record. What become of the money as was paid on this contract? Where was it transferred to?

The Witness: Well, on both of these contracts we were instructed to credit Mr. Barcott's savings account.

Mr. Gagliardi: And that is then, exhibit——

The Witness: Number 64787. And these payments are evidenced by certain credit entries on those cards.

Mr. Gagliardi: And that is a contract between John Barcott and Anton Barcott, was it? Do you know who Anton Barcott was?

The Witness: Anton?

Mr. Gagliardi: Yeah.

The Witness: Why, I thought it was his son.

Mr. Gagliardi: We have no objection.

The Court: Do I understand you have no objection?

Mr. Gagliardi: No objection.

The Court: They may be admitted in evidence.

Mr. Pomeroy: That is the original record.

Mr. Gagliardi: Those are original record. I have no objection, you may substitute the original record with a copy, and certify that it be such. However, I will ask him a few more questions before we release the witness this afternoon.

Mr. Pomeroy: Did I understand, your Honor, that you admit all the exhibits? [45]



(Testimony of Sparks Washburn.)

The Court: No, I did not understand whether counsel was withdrawing his objection to 9 and 10, or whether he wanted——

Mr. Gagliardi: No, I only—your Honor, I made no objection to Exhibit No. 7, which is a complete record, according to the testimony of the witness.

(Whereupon a copy of the checking account of the California Oyster House for the period January 1, 1943, through December 31, 1945, and the original record of real estate contract and conditional sales contract of John Barcott at the National Bank of Washington, were admitted in evidence as Plaintiff's Exhibits No. 7 and 9, respectively.)

Mr. Gagliardi: Now, showing you Exhibit No. 8, does that show a complete record of Mr. Barcott's saving account, does it show just merely for a number of years?

The Witness: I think, as I stated before, it shows a complete record.

Mr. Gagliardi: The saving account shows a complete record?

The Witness: Complete record, from the time that he opened it, February the 9th, 1937. [46]

Mr. Gagliardi: Is that the same date that the contract was placed with you for collection?

The Witness: I believe it is. Let me see the record. 2/9/37. That is correct.

Mr. Gagliardi: That's all. No objection.

The Court: It may be admitted in evidence.



(Testimony of Sparks Washburn.)

(Whereupon the original record of the savings account of John Barcott, February 9, 1937, through October 1, 1947, was admitted in evidence as Plaintiff's Exhibit No. 8.)

The Court: Do I understand you have finished your direct examination?

Mr. Pomeroy: After you have passed on the admission of these, I have, your Honor. I understood, you see, that you had admitted all of them. As soon as you pass on the——

The Court: There was one other——

Mr. Gagliardi: We have no objection on this. It may be admitted.

The Court: That's No. 9, is it?

Mr. Gagliardi: No, that's No. 6, I think, isn't it?

Mr. Pomeroy: Ten, your Honor.

Mr. Gagliardi: No. 10. [47]

(Whereupon the original signed entrance tickets to safe deposit box No. 3064, dated January 28, 1946, and February 13, 1946, were admitted in evidence as Plaintiff's Exhibit No. 10.)

Mr. Pomeroy: You may inquire.

#### Cross-Examination

By Mr. Gagliardi:

Q. Mr. Washburn, Mr. Barcott has been a customer of the bank for the last twenty years that you have been there?

A. At least twenty years I would say, yes.

(Testimony of Sparks Washburn.)

Q. You have his checking account and his checking account transaction. You have the record of all his checking account? A. Oh, yes.

Q. From the very beginning. Have you examined that account before you made this copy, or somebody else made the copy for you? [48]

A. Well, naturally, we had one of our trusted employees make the actual transcription.

Q. And you had somebody else make the transcription of this record? A. Yes, sir.

Q. Did you verify then by checking and see whether or not they were properly transcribed?

Mr. Pomeroy: If the Court please, at this time I'll object to this line of questioning, as I thought it was agreed to have been, when this man brought in the copy that he accepted, to relieve the bank of that——

Mr. Gagliardi: I am speaking, you see, of No. 7, the one I made the objection to.

Mr. Pomeroy: That's the one I am talking about. That is the one I thought we agreed to. We wouldn't cause the bank to go to all that difficulty on. Of course, if you are going to question it, why then we would ask the bank to bring the records in. I don't like to have it brought in—brought up now that there may be some inaccuracy in it, because it was only for their convenience that this was done.

Mr. Gagliardi: Let me get to this exhibit, Mr. Clerk, so I may refer to the proper numbers. There will be no confusion as to what I am referring to.

(Testimony of Sparks Washburn.)

Q. Mr. Washburn, I am not questioning Exhibit No. 9, nor do I'm questioning Exhibit No. 8. I am referring merely to Exhibit No. 7, which is the record of the checking account of John E. Barcott. This was a copy—copied from your record?

A. Yes, sir.

Q. That is someone told you that it was a copy.

Mr. Pomeroy: Well, if the Court please, I again have to make my objection to this one the ground that a stipulation was entered into between counsel here that this is a copy and we would accept it as such, that it is a true and accurate copy.

The Court: I understood such was the stipulation.

Mr. Gagliardi: Your Honor, let me make myself clear so we will have no misunderstanding in the matter. I say I have no objection that a copy be substituted. What I want's an accurate copy. I don't want somebody—some small clerk to make a copy and then [50] say, "That is a correct copy." I want this man who is an official of the bank to say that it is. If it is, I want the man who made it. But I have no objection.

The Court: He has testified that it is a copy made under his direction by a trusted bank employee. is that correct?

Mr. Pomeroy: That is correct.

Mr. Gagliardi: Well, that's what I want to find out, your Honor. I don't want, I'm trying to delay the matter.

The Court: Well, that's what he has testified.

(Testimony of Sparks Washburn.)

Q. This was made by somebody under your direction? A. Yes sir.

Q. And you examined it to see whether it was correct or not?

A. Well, it has to be correct, Mr. Gagliardi, because the figures are carried forward in subtotals, and any moment that the account appears wrong or different from the original record, it would show a different total. But, the account balanced with the original records all the way through.

Q. You checked that it balanced with the original record?

A. No, no, I didn't take and check each one of them, and a [51] man that's been in the bank twenty-five years, and is one of our valued trusted employees, surely can be trusted to produce the—an accurate record.

Q. Have you examined this record, Mr. Washburn, and compared it with what took place prior to January 1, 1943, as to whether or not the bank transaction were identical the same, in the same manner and to the same extent?

A. I don't understand.

Q. Have you examined the record of the—of your bank in relation to the transaction, the checking account transaction, prior to January 1, 1943?

A. No.

Q. You haven't. So you do not know whether or not the matter of the number of checks were approximately the number of checks, and also the

(Testimony of Sparks Washburn.)

approximate amount of deposit were made prior to January 1, 1943, is the same as made after January 1, 1943?

A. No, I wouldn't. I wouldn't say that I had examined those.

Q. Were those records available?

A. Yes, sir.

Q. And if we need it, you will be able to produce them? Can we subpoena them?

A. We can produce them all right. [52]

Q. Now coming to the contract account, this contract was placed to your bank for collection?

A. Yes, sir.

Q. It was in the collection department?

A. It was—yes.

Q. You don't know whether Mr. Barcott ever saw what record the bank had kept?

A. Well, I presume, but——

Q. Now I don't want any presumption about it now, Sparky. I want if you know——

A. When a real estate contract is left with our bank, we draw out the original record in duplicate, and the duplicate is given to the beneficiary.

Q. But I mean to say, as the collection were made, do you know whether or not Mr. Barcott knew how they were, how proportionate, what portion was a credit to interest and what portion was credited to principal?

A. Oh, yes, we always advised the amount of principal payment and the amount of interest.

(Testimony of Sparks Washburn.)

Q. To the man who pays?

A. No, no, that record is made up in triplicate, one for the payer, one for the beneficiary or the owner of the contract, and one for the permanent bank record.

Q. You mean to tell me the bank gave Mr. Barcott the copy [53] of each payment that was made, showing what payment were made and how they were applied?      A. Yes sir.

Q. Do you know that of your own knowledge?

A. I know that that's our practice. I don't know why it wouldn't have been done in this case.

Q. You are not in charge of the collection department, are you?

A. Well, perhaps as much as in charge of it as anyone, Mr. Gagliardi.

Q. You are in charge——

A. Our duties overlap.

Q. ——of this saving account department, the checking account, aren't you not?

A. It can't be said that I'm in charge of any particular department, because I work in personnel and operations.

Q. This bank account now, been pretty well gone, for long time, wasn't it? According to the record, as the only money deposited was what was paid on this contract.

A. Well, it's quite obvious that most or practically all of those deposits in that savings account are from——

(Testimony of Sparks Washburn.)

Q. The contract.

A. —the contract record, u-huh.

Q. And as the payment were made to the collection department, [54] or to the trust department, they were transferred to the saving account.

A. That's right.

Q. How often would Mr. Barcott come over and bring his saving book to credit his saving book with the money which had been paid on this account?

A. How often would he do that?

Q. Yeah. A. I don't—

Q. If he ever.

A. I don't know if he ever did.

Mr. Gagliardi: Now let me have that exhibit again please.

Q. This amount of money which was shown on deposit, on Exhibit 9, January 1, 1946, was still on the saving account of your bank. Do you know whether or not it has been withdrawn since then?

A. Let me see the record. No, I mean the—there is another exhibit, the savings account record there, I believe. What number is it?

Mr. Gagliardi: Let him see the saving—

The Witness: Now, will you restate your question, Mr.—

Q. Has the money which had been paid on this contract been [55] transferred to the saving account? You answered it had been. Was the money which was deposited in the saving account withdrawn from the saving account prior to January 1, 1945—'46?

A. January 1, 1946?



(Testimony of Sparks Washburn.)

Q. Yes.

A. Well, there are three withdrawals on the account.

Q. Prior to that date? A. Yes.

Q. What date?

A. No—let's see—two. Two prior to that date. The date of the first withdrawal is ten hundred and fifty dollars on March the 16th, 1938.

Q. '38. And the next?

A. March—or, January 16th, 1940, twenty-seven hundred and fifty dollars.

Q. That's the only two withdrawal out of that account?

A. Prior to the date mentioned by you, yes sir.

Q. You do not know, Mr. Washburn, the relationship between those two parties on this contract, between father and son, do you? A. No sir.

Mr. Gagliardi: That's all.

Mr. Pomeroy: That's all.

(Witness excused.) [56]

### JAMES T. KERR

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Pomeroy:

Q. Please state your name to the Court.

A. James T. Kerr.



(Testimony of James T. Kerr.)

Q. And what is your occupation?

A. President of the Washington Safe Deposit Company.

Mr. Pomeroy: Will you get the records for me please? Mark those please.

The Clerk: You want all these marked?

Mr. Pomeroy: Yes, all of them.

The Clerk: Plaintiff's Exhibit No. 11, for identification.

Q. The bailiff is handing you what is marked for identification as Plaintiff's Exhibit No. 11. Will you state what that is, if you know?

A. These are entry cards when they want to enter the safe deposit box.

Q. Does John Barcott have a box at your place of business? A. He does.

Q. How long has he had it?

A. Oh, I—the ledger account is there. I couldn't say [57] right off—

Mr. Pomeroy: You may hand him this to refresh his recollection.

A. The third of—third of September, 1942.

Q. He's had a box there since September 3, 1942?

A. Yes, that's this particular box. He might have had a box before that, but this particular box.

Q. This particular box. A. Yes.

Q. And he still has it at this time?

A. That's right.

Q. And does John Barcott's signature appear on Exhibit No. 11 marked for identification?

A. Yes, it does.

(Testimony of James T. Kerr.)

Mr. Pomeroy: I'll offer Exhibit No. 11, so that the defense counsel can——

Mr. Gagliardi: I object to it, incompetent, irrelevant and immaterial. It has no purpose, unless this exhibit shows that he did.

The Court: Objection will be overruled. It may be admitted in evidence. Exception allowed.

(Whereupon the entrance cards of the Washington Safe Deposit Company were admitted in evidence as Plaintiff's Exhibit No. 11.)

Mr. Pomeroy: You may inquire.

Mr. Gagliardi: May I see that, the exhibit? [58]

Mr. Gagliardi: No cross-examination.

Mr. Pomeroy: You may step down, Mr. Kerr.

(Witness excused.)

Mr. Gagliardi: I am renewing my objection as being incompetent, irrelevant——

The Court: The court has ruled upon it. There is no use to renew it.

Mr. Gagliardi: I suggest that I didn't make myself clear to your Honor. I want to be sure that your Honor understood my objection.

### JOHN PLANCICH

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Pomeroy:

Q. Please state your name to the Court.

A. John Plancich.

(Testimony of John Plancich.)

Q. Spell it, for the——

A. P-l-a-n-c-i-c-h.

Q. And where do you live, Mr. Plancich? [59]

A. Anacortes.

Q. What is your occupation?

Q. General Manager of Fishermen's Packing Corporation.

Q. And do you know John Barcott?

A. Yes, I do.

Q. How long have you known him?

A. Oh, I guess for the last twenty years—all my life.

Q. Do you have with you the stock book of your corporation?

A. I have the ledger sheet affecting his stock holdings.

Q. Would you please let me have it?

Mr. Pomeroy: If you will mark this, please.

The Clerk: Plaintiff's Exhibit No. 12, for identification.

Q. The bailiff is handing you what is marked for identification as Plaintiff's Exhibit No. 12. Will you state to the Court what that is?

A. This is a stock—a sheet from the stock record book, showing the stockholdings of Mr. Barcott, and all the stock transfers that have occurred from the time of purchase of his stock to his present holdings.

Q. When does that—what is the first date on that stock book?

A. That's March 22, 1932. [60]

(Testimony of John Plancieh.)

Q. And does it carry through to the present date?

A. Yes. The last entry on here was a transfer of stock in—July 26, '46.

Q. July 26, '46. If you will hand that to the defense attorneys, please.

Mr. Pomeroy: I'll offer Exhibit No. 12.

The Court: Is that your original record?

The Witness: Yes, that's—

Q. If you will—do you have a record of the dividends paid during 1943, '44 and '45?

A. I haven't—I don't have the records with me. I have the minute books here that authorize payment of the dividends, and percentage.

The Court: Are you offering Exhibit No. 11?

Mr. Gagliardi: No objection to that exhibit.

Mr. Pomeroy: It's 12, your Honor.

The Court: Or 12. It will be admitted in evidence.

Mr. Pomeroy: Will you give that sheet of paper there—— [61]

(Whereupon the original sheet from the stock record book of the Fishermen's Packing Corporation, showing the stockholdings and transfers of stock, of Mr. Barcott, was admitted in evidence as Plaintiff's Exhibit No. 12.)

Q. Is that a——

A. No, this is some notes that I've been——

Q. Well, may we have your minute book, please, and have it marked?

A. You—affecting the last three years?

(Testimony of John Plancich.)

Q. Affecting the last three years.

Mr. Gagliardi: The last three years, that concerning—

Q. 1943, '44 and '45.

A. '43, '44 and '45.

Mr. Pomeroy: If defense counsel has a moment to look at that, I think, your Honor, they may allow testimony to go in without putting the whole minute book in.

The Court: Very well.

The Clerk: Plaintiff's Exhibit No.—

Mr. Gagliardi: You may show it to him.

The Clerk: Plaintiff's Exhibit No. 13, for identification. [62]

Q. The bailiff is handing you what is marked for identification as Plaintiff's Exhibit No. 13. Will you state what that is, if you know?

A. It's the minute book of the corporation.

Q. Does that show the amount of dividends paid to John Barcott by the corporation for the years 1943, '44 and '45?

A. Well, the dividends are authorized—payment of dividends are authorized by the Board of Directors and such action is recorded in the minutes of the Board of Directors.

Mr. Pomeroy: Now, if we can have the book—

Mr. Gagliardi: Will you mark the three years in question, so we don't have to look at the whole book?

The Witness: How's that?

(Testimony of John Plancich.)

Mr. Gagliardi: Will you mark the three years in question, so we don't have to look at the whole book? '43 and '44 and '45.

The Witness: I refer—refer to my notes here to see whether I gave any dividends to Mr. Barcott.

Mr. Pomeroy: May I see Exhibit 12?

The Court: Now if that is going to be a matter that is going to take some fifteen or twenty minutes—— [63]

Mr. Gagliardi: Well, I just wanted to ask him a question.

Showing you the minutes of the record of the meeting of March the 17th, '43, Plaintiff identification number—what? Twelve?

The Clerk: Thirteen.

Mr. Gagliardi: Thirteen. Will you point to the Court and jury where the dividends were declared? There was no dividend declared—I can't grasp it as fast as you can.

The Witness: It's in the minutes of April 22nd, not March 17th.

Mr. Gagliardi: Oh, I see. What do they declare as a dividend?

The Witness: "Moved by Nick Vitilis seconded by Anton Cortege that a ten percent dividend be paid on all outstanding stock as of date."

Mr. Gagliardi: As of that date.

The Witness: As of that date.

Mr. Gagliardi: Ten percent. Ten percent of the stock, or value of the stock, or the par value, or ten percent of what? Ten percent of——

The Witness: Ten percent of par value.

(Testimony of John Plancich.)

Mr. Gagliardi: ——or the earning? [64]

The Witness: Of par value.

Mr. Gagliardi: The stock was par value stock, or was non par value stock?

The Witness: Par value stock.

Mr. Gagliardi: And when was next dividend? That's the only dividend——

Mr. Pomeroy: What date was that now?

The Witness: That was on April 22, 1943.

Mr. Pomeroy: And when's the next one?

The Witness: The next was on January 27, 1944, "Motion by Nick Vitilis, seconded by Dick King, that a six percent dividend be paid on all outstanding stock as of date." Do you want the third one?

Mr. Pomeroy: Yes.

The Witness: The third one is April 19, 1945, "Motion by Dick King, seconded by Lee Mack, that a six percent dividend be paid on all outstanding stock as of date."

Mr. Pomeroy: Were those dividends paid by the company?

The Witness: Yes, they were [65]

Q. Referring to Plaintiff's Exhibit No. 12, it sets forth that during this period of time in 1943, '44 and '45, John Barcott had fourteen shares of stock. What was the par value of the stock?

A. A hundred dollars a share.

Q. Then the par value of the fourteen shares was fourteen hundred dollars?

A. That's right.



(Testimony of John Plancich.)

Q. And the ten percent dividend would be a hundred and forty dollars paid to that stock.

A. That's right.

Mr. Pomeroy: You may inquire.

Cross-Examination

By Mr. Gagliardi:

Q. You have no knowledge as to whether or not Mr. Barcott was mailed a check for those dividends?

A. Whether he was mailed a check, did you say?

Q. Yes, whether the dividend was paid to him.

A. Yes, I am quite sure they were.

Q. You paid him a hundred and forty dollars dividend for first year; six percent in the next, that makes eighty-four [66] dollars.

A. That's right.

Q. And what was the last dividend?

A. Six percent also.

Q. How many shares did he have—fourteen shares? A. Fourteen shares.

Q. That makes again, sixty-four dollars—eighty-four dollars, for '45 and '44, and \$140 for '43?

A. That's right.

Mr. Gagliardi: That's all.

Mr. Pomeroy: You may step down. I was going to ask if it's satisfactory he takes the minute book away from evidence now. It's been marked.

Mr. Gagliardi: Yeah, we have no objection.

(Witness excused.)

Mr. Pomeroy: May I have Exhibits 1, 2, and 3. [67]



MRS. JOSEPHINE K. CORBIN

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pomeroy:

Q. Please state your name to the Court.

A. Mrs. Josephine K. Corbin.

Q. Will you spell your last name, please?

A. C-o-r-b-i-n.

Q. And what is your occupation?

A. I am an auditor in charge of the—of a group of tax auditors in the Income Tax Department.

Q. Where?

A. Internal Revenue Department, in the Washington Building, Tacoma, Washington.

Q. Tacoma. A. Right.

Q. Do you know John Barcott?

A. Yes, sir.

Q. How long have you known him?

A. I've known him for many years, ever since I started to work in town.

Q. And how long have you worked for the Government over in the Internal Revenue Department? [68]

A. Since July, 1933.

Q. The bailiff is handing you Exhibits 1, 2 and 3. Do you recognize those exhibits as having John Barcott's signature on them? A. Yes, sir.

Q. And did you yourself prepare any of those exhibits? A. Yes, sir.

(Testimony of Mrs. Josephine K. Corbin.)

Q. Which ones did you prepare?

A. The returns for 1943 and 1944.

Q. And where were you when you prepared those returns?      A. In my office.

Q. And did Mr. Barcott come to your office?

A. Yes, sir.

Q. And from what figures did you prepare those returns?

A. Well, the same as for any other taxpayer if he brought the information with him and supplied the figures, and from these figures which he gave me I prepared the returns in question.

Q. Did he have any books of account with him when he brought these figures to you?

A. No, as I recall, just—I don't really know what he had with him, but he had papers, information that was necessary, and it was sufficient upon which to prepare this return. [69]

Q. And how many papers would you say he had with him when he came in to have his income tax made out?

A. He had—it would be impossible to say just exactly how many, but he had apparently the necessary information, I would—he had an envelope, as I recall, with different information in it and whatever we needed we asked him for the figures, and the information, and he supplied the necessary information—figures.

Q. Did you see those figures yourself, or did he read them to you?      A. Both.

Q. You saw some of them and he read some to you?      A. That's correct.

(Testimony of Mrs. Josephine K. Corbin.)

Q. And as you went down the list of various items on the income tax returns, you would ask him what he had—what to fill in at that certain spot, is that right?

A. That's right, I would ask for the information the same as we do with all taxpayers, whatever was necessary and he supplied the figures and the information.

Q. But he had no books of account with him or anything of that kind?

A. As I recall, he didn't exhibit any to me.

Q. These——

Mr. Pomeroy: I think you may inquire. [70]

#### Cross-Examination

By Mr. Gagliardi:

Q. That is the ordinary procedure, Mrs. Corbin, of a taxpayer coming into the office of the Internal Revenue Collector and present information for you to prepare an income tax return, is it not?

A. That is right.

Q. And no one brings their books along with them. They bring the ordinary figure which are necessary to make out their return.

A. That is correct.

Q. And all of those who come to your office, they have the amount which they have received, their expenditure, and the source of where they come from, and then from that you file the return for them.

A. That is correct.

(Testimony of Mrs. Josephine K. Corbin.)

Q. You ask them some question, when they are pertinent, don't you?      A. Yes, sir.

Q. And he was not any different than any other taxpayer?      A. None whatsoever.

Mr. Gagliardi: That's all.

Mr. Pomeroy: You may step down.

(Witness excused.)

### HARRY O. SWANSON

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Pomeroy:

Q. Will you state your name to the Court, please?      A. Harry O. Swanson.

Q. And what is your occupation?

A. An Internal Revenue Agent.

Q. How long have you been employed by the Government?      A. Ten years.

Q. And what does a Revenue Agent do, just tell the Court——

A. A Revenue Agent examines income tax returns of all taxpayers on instruction and order from the Revenue Agent in Charge.

Q. Do you know John Barcott?      A. Yes.

Q. When did you first meet him?

A. On February 13, 1946.

(Testimony of Harry O. Swanson.)

Q. And what occurred on that occasion?

A. He was called to our office in the Puget Sound Bank Building to meet with myself and Special Agent Neilson. At that time he was requested, if he so desired, it would be advisable to recheck a safety deposit box at [72] the National Bank of Washington, which according to my information had been previously checked by Mr. Neilson.

Q. Then what occurred?

A. Mr. Barcott was agreeable and we proceeded to the National Bank of Washington, entered the vault and secured the box, retired to one of the small rooms, and checked the contents thereof.

Q. And what occurred after that?

A. Upon leaving the National Bank of Washington, we asked Mr. Barcott if he had another safety deposit box, and he replied, "Yes," he had one located in the Washington Building. We proceeded to the Washington Building and Mr. Barcott secured his box and opened it for inspection.

Q. And what did you find in that box?

A. Just some business insurance papers.

Q. And what did you do with respect to John Barcott after that?

A. I proceeded to make an audit of such records as Mr. Barcott had and secure information from such other sources as were available in an attempt to determine Mr. Barcott's income for the years 1943, 1944 and 1945.

(Testimony of Harry O. Swanson.)

Q. In preparing this audit, did you have available the income tax returns of John Barcott and Katie Barcott, [73] his wife, for the years 1943, '44 and '45? A. Yes, I did.

Q. And did you have available the banking records of the National Bank of Washington of the California Oyster House, and the checking account, and the savings account of John Barcott, and the information concerning the conditional sales contract and real estate contract in the name of John Barcott?

A. Yes, they were examined at the banks—or at the sources.

Q. And then you proceeded to prepare a statement of income, is that correct?

A. That's right.

Q. And what method did you use in establishing this income?

A. This income was determined on the increase in net worth basis.

Q. And explain to the Court just exactly what you mean by that.

A. The net worth basis is the basis used in determining income where complete and adequate records are not maintained by the taxpayer. The income is computed on the difference between the net worth of the taxpayer at the beginning of the year and the net worth at the end of the year, the difference constituting income, provided of course, that as far as it is able to be [74] determined it comes from a taxable source, such as salaries, wages,

(Testimony of Harry O. Swanson.)

dividends, interest, business income, or rents. This was done in the case of John Barcott, as his records did not appear adequate to make a complete and detailed audit as such.

Q. And what did you find—then you started your account as of December 31, 1942, is that correct?

A. Yes, or similarly, January 1, 1943.

Q. And then did you compute it for each year hereafter until December 31, 1945?

A. I did.

Q. Do you have your working figures with you here? A. Yes, I do.

Q. Will you state what you found to be the net worth, and what items composed it, as of December 31, 1942?

Mr. Gagliardi: I'm objecting, Your Honor, unless he shows what sources he has derived this information. We ought to at least know where he got this information what our net worth was on December 31, 1942, before he draws his conclusion by saying that that's all we were worth. I'm objecting to that.

The Court: I thought he did state from what source. If he did not, you may ask him the question again. [75]

Mr. Pomeroy: Well, I went through the Exhibits, if the Court please, and the fact that he had made an audit of his safe deposit box and all these other things, and he said he used all those in making his report. I don't know what more I can ask him.



(Testimony of Harry O. Swanson.)

The Court: That is the Court's impression, but I think you may ask him again, if counsel misunderstands what he——

Q. From what sources did you obtain the information concerning the defendant, John Barcott's net worth?

A. From the inventory of the contents of his safe deposit box in the National Bank of Washington, the checking account at the National Bank of Washington, the savings account at the National Bank of Washington, the conditional sales contract at the National Bank of Washington, the real estate contract at the National Bank of Washington, the records of the Fishermen's Packing Corporation at Anacortes, Washington, and the records of the Pierce County Courthouse relative to real estate transactions.

Q. What did you determine to be, and the items of his net worth, on December 31, 1942? [76]

Mr. Gagliardi: Again, if Your Honor please, I am objecting because this man hasn't shown any information that he had. I would like to ask a question before Your Honor may rule——

The Court: Let's proceed. The Court has overruled your objection.

Mr. Gagliardi: Then if Your Honor please, I would like to see that my records are correct. I am objecting to this man as testifying to any information which he didn't have at the time when he says—his testimony so far goes now. So I call



(Testimony of Harry O. Swanson.)

Your Honor's attention that the first time he met John Barcott was in January, 1946, that the first time he examined the books——

The Court: I don't really want an argument. Now I understand the position you take, and I am overruling your objection and allowing you an exception, so we will get along.

Q. Please state the items and what his net worth was according to your figures on December 31, 1942.

A. The net worth as of December 31, 1942, was determined to be \$57,278.56.

Q. And just explain the items and the source of your information concerning those items, so that they total up to \$57,000 some odd dollars. [77]

A. The first item on hand was cash in the safety deposit box at the time I checked it on February 13th, of \$23,000, consisting of——

Mr. Gagliardi: Just a minute. If Your Honor please, I would like to know the year. February 13th of what year?

The Witness: 1946.

Mr. Gagliardi: You were talking about 1942. You are talking as to value in 1942, it was determined how much Mr. Barcott was worth on January 1, 1942, by testimony of information which you got out of the box in 1946.

The Court: He has testified that he found his net worth in January '42 to be \$57,000 plus.

Mr. Gagliardi: Well that's what was in the box, the money that was in the box in 1946.

(Testimony of Harry O. Swanson.)

The Court: Mr. Gagliardi, you interject so much argument to your objections. If you will just make them and just briefly state your ground we will save a lot of time and save a lot of record.

Mr. Gagliardi: I am sorry, Your Honor, that I may be too talkative in cases of this kind. I am objecting because the witness testified that his information he got out of the safe deposit box was in January— [78] February 13, 1946, and he is testifying by what he found in the box on that date he determined that Mr. Barcott was worth \$57,000 on January 1, 1942. I am objecting that the information—

The Court: The objection will be overruled, an exception allowed. You will have an opportunity to cross-examine as to how he arrived at his conclusion.

Q. My understanding, Mr. Swanson, is to the effect that the date you are talking about is December 31, 1942, is that correct?

A. That's right.

Q. Not January, 1942. This is December 31, 1942.

A. December 31st.

Q. And the \$23,000 item of cash is the same amount of cash that you found in a safe deposit box in January of 1946, is that correct?

A. That's right.

Q. And you were not charging, for income tax purposes, Mr. Barcott—

Mr. Gagliardi: I object. I am going to object now, Your Honor. His asking for the explanation is argumentative.

The Court: Proceed.

Testimony of Harry O. Swanson.)

Q. You were not charging him with income of 3,000, you are giving him the idea that he had the 3,000 on [79] December 31, 1942.

A. That's right, I was giving him credit for it the beginning of the period.

Q. In other words, you are not charging him over the period at all.           A. That's right.

Q. All right, now what is the next item that you have to make up this \$57,000?

A. Savings account at the National Bank of Washington, number 64787.

Q. How much does that amount to?

A. As of December 31, 1942, according to the records of the bank, there amounted to \$2,279.53.

Q. You received that from the bank?

A. That's right.

Q. And what is your next item?

A. The next item is a checking account at the National Bank of Washington.

Q. How much did you credit him there?

A. That was estimated at a thousand dollars.

Q. And how do you estimate it at a thousand dollars, and tell the jury why you estimated it.

A. That was an average monthly balance. The reason it was taken at a thousand dollars, it remained at an average [80] figure like that, such as—through the entire period. It showed no accumulations and no large disappearance. Just a general business account.

Q. Now, what is the next item that you have on there?

A. United States Savings Bonds, at cost.

(Testimony of Harry O. Swanson.)

Q. And what are those—what amount do you have for that?

A. December 31, 1942, we have a cost value of \$14,450.

Q. And how did you get that figure?

A. By referring to the issue dates on the bonds which were inventoried in the box on February 13, 1947—'46, rather.

Q. What other information did you have to check on the amount of bonds that he had?

A. I checked with the records of the Fiscal Administrator who takes—keeps the records for all bond transactions.

Q. And those are represented here in evidence by Exhibits number 4, 5, and 6, is that correct?

A. I believe that's right.

Q. These exhibits here, 4, 5, and 6. Then what is the next item that you have?

A. Real estate contract, number 803A, in the National Bank of Washington.

Q. How much was that?

A. That had a balance at the end of 1942, of \$1,596.35.

Q. And where did you get that information? [81]

A. From the National Bank of Washington.

Q. And what is your next item?

A. Conditional sales contract.

Q. And what amount do you have for that?

A. \$494.73.

Q. And where did you get that information?

A. From the records of the National Bank of Washington.

(Testimony of Harry O. Swanson.)

Q. And what is your next item?

A. Home and furnishings.

Q. How much is that?

A. It was estimated at \$8,000, and remained so through the entire period.

Q. In other words—who estimated it?

A. I estimated it.

Q. You estimated it, but you didn't change that—

A. I didn't change it; it doesn't affect the income.

Q. And business fixtures—I mean, what is the next item?      A. Business fixtures.

Q. And how much is that?      A. \$3,815.90.

Q. Where did you get that figure?

A. From the income tax return filed by Mr. Barcott.

Q. That's Mr. Barcott's own figures, then.

A. As far as I know, it is. [82]

Q. They were on his income tax return?

A. Yes, sir.

Q. And what is the next item you have?

A. Stock in the Fishermen's Packing Corporation.

Q. How much is that?

A. Fourteen hundred dollars.

Q. Where did you get that information?

A. From the records of the Fishermen's Packing Corporation.

Q. And what is your next item?

A. Lots 3 and 4 of Block 9729, Tacoma Sixth Addition.

(Testimony of Harry O. Swanson.)

Q. And what amount do you have for that?

A. \$3,150.

Q. And how did you arrive at that?

A. From the records of the Pierce County Courthouse.

Q. Now does that figure go all——

A. That remains the same all the way through, and doesn't affect the income.

Q. It doesn't have any affect on the final result. What is your next item?

A. Lots 19 and 20, Block 8633. Tacoma Sixth Addition.

Q. What do you have for that?

A. I'm sorry, that isn't on there at the end of 1942. It was acquired in '43.

Q. You have something down there, what is it?

A. I have "none" there. [83]

Q. When did he acquire Lots 19 and 20?

A. He acquired that in 1943.

Q. And the items that then you have then totaled up to date, amounted to how much?

A. \$59,186.51.

Q. And then you give him a credit for depreciation? A. I do.

Q. And what amount is that?

A. Accumulated depreciation reserve on the business fixtures of \$1,907.95.

Q. And that makes the net worth then that you figured—— A. Of \$57,278.56.

(Testimony of Harry O. Swanson.)

Q. Tell the Court how you got your figure for reserve for depreciation.

A. That was taken from the return of John Barcott.

Q. In other words, that's John Barcott's own figure.

A. That's right.

Q. Now then, you're—you have taken that as a starting point from December 31, 1942?

A. That's right.

Q. And your next date then, is December 31, 1943, or one year later, is that right?

A. That's right.

Q. Now these same items, will you tell what you have for [84] cash on hand?

A. Yes, the same as the amount at the beginning, \$23,000.

Q. And your next item, savings account in the National Bank of Washington, what do you have there?

A. That increased to \$2672.13.

Q. Does that show an increase——

A. It does.

Q. ——or a decrease?           A. From \$392.60.

Q. Increase?

A. That's right, increase.

Q. And you have a checking account in the National Bank of Commerce.

A. National Bank of Washington.

Q. National Bank of Washington.

A. Yes, sir. That remained at the same figure of \$1,000.

(Testimony of Harry O. Swanson.)

Q. And then you have U. S. Savings Bonds at cost, and what figure do you have for that?

A. \$35,200.

Q. And what does that show, an increase?

A. It shows an increase.

Q. Of how much? A. \$20,750.

Q. Then your real estate contract, how much do you show [85] for that? A. \$1,448.07.

Q. What does that show? A. A decrease.

Q. Of how much? A. Of \$148.28.

Q. And your conditional sales contract, what do you have for that?

A. That showed a decrease of \$106.59.

Q. And then your home and furnishings remain the same. A. That's right.

Q. Your business fixtures, what does that show this time?

A. It shows an increase of \$1,109, giving an ending balance of \$4,924.90.

Q. And how did you—where did you get the figure \$1,109?

A. The \$4,924.90 was set forth on the return.

Q. That's John Barcott's own figures.

A. That's right, and the \$1,109 is the difference between that and the one he showed on the previous year's return.

Q. And the Fishermen's Packing Corporation stock, does that remain the same?

A. That remained the same.

Q. And the Lots 3 and 4, Tacoma Sixth Addition, does that remain the same? [86]

A. That remained the same.



(Testimony of Harry O. Swanson.)

Q. Lots 19 and 20?

A. They were acquired during 1943, at an estimated cost of \$750.

Q. Now what does your total assets of—

A. \$81,933.24.

Q. And did you then give a reserve for depreciation?      A. I did.

Q. How much was that?      A. \$2,726.58.

Q. Showing a net worth of how much?

A. \$79,206.60.

Q. All right, now, this reserve for depreciation, again where did you get that?

A. I got that from the income tax return of Mr. Barcott for the year 1943.

Q. Mr. Barcott's own figures.

A. That's right.

Q. And what does your net worth then show, an increase or a decrease?

A. It shows an increase during the year.

Q. An increase of how much?

A. \$21,928.10.

Q. Now, on December 31, 1944, cash on hand item, what does [87] that show?

A. The same amount as at the beginning of the year, \$23,000.

Q. And your savings account, what does that show?

A. It showed an increase to \$3,191.32, or an increase of \$519.19.

(Testimony of Harry O. Swanson.)

Q. And your checking account, what did that show?

A. That remained the same as at the beginning, \$1,000.

Q. Your United States Savings Bonds, how much did that show?

A. \$54,200, or an increase of \$19,000.

Q. Now, on these dates on these savings bonds, you got the dates of knowing what year that they were purchased from the bonds themselves, is that right?

A. That's right.

Q. The issuing date. The real estate contract, how much does that show?

A. \$1,214.25, or a decrease of \$233.82.

Q. And the conditional sales contract?

A. \$232.94, or a decrease of \$155.20.

Q. And the home and furnishings remained the same?

A. That remained the same.

Q. Business fixtures?

A. They remained the same. [88]

Q. Fishermen's Packing Corporation?

A. Remained the same.

Q. Lots 3 and 4? A. Remained the same.

Q. Lots 19 and 20?

A. Remained the same.

Q. Making a net—or total assets of how much?

A. \$101,063.41.

Q. And how much depreciation did you allow then?

A. A reserve for depreciation of \$3,600.66.

(Testimony of Harry O. Swanson.)

Q. Where did you get that figure?

A. From the return of Mr. Barcott.

Q. Mr. Barcott's own figures?

A. That's right.

Q. All right, now what did you find his net worth to be then on December 31, 1944?

A. \$97,462.75.

Q. How much is that an increase over the previous year?      A. \$18,256.09.

Q. Now getting down to December 31, 1945, what do you show there for cash on hand?

A. The same amount as at the beginning, \$23,000.

Q. And what do you show in the savings account?

A. \$3,629.03, or an increase of \$437.71. [89]

Q. What do you show for the checking account?

A. It remains the same as at the beginning.

Q. What does it show for United States Savings Bonds?

A. Increase to \$74,200, or an increase of \$20,000.

Q. And you have since found another one, is that correct?      A. Well, not in that year.

Q. Not in—what year did you find it in?

A. 1944.

Q. How much was that bond?

A. That was a five-thousand-dollar bond.

Q. That has not been figured in this total at all?

A. No, it hasn't. It is not in this total.

Q. This shows an increase over 1944 then, of \$20,000?      A. That's right.

Q. The real estate contract, what does it show?

A. It shows a decrease to \$1,039.83, or a decrease of \$174.42.

(Testimony of Harry O. Swanson.)

Q. And conditional sales contract, what do you show for that?

A. \$65.99, or a decrease of \$166.95.

Q. And home and furnishings?

A. That remained the same.

Q. Business fixtures?

A. Remained the same. [90]

Q. Fishermen's Packing Corporation stock?

A. Remained the same.

Q. Lots 3 and 4? A. Remained the same.

Q. Lots 19 and 20?

A. They were not in there at the end of '45, since the lots were sold during 1945.

Q. What do you show then to be the total assets of December 31, 1945? A. \$120,409.75.

Q. Do you show a reserve for depreciation there? A. I do.

Q. How much? A. \$4,093.15.

Q. And where did you get that figure?

A. From the return of Mr. Barcott.

Q. That's his own figure?

A. That's right.

Q. What do you show his net worth to be then on December 31, 1945? A. \$116,316.60.

Q. You then figured from this net worth computation, the accrued tax that he should have paid, is that correct? A. Yes. [91]

Q. Now these income taxes that he paid, what type of return did he make? Was it a community property return?

A. Yes, he made a community property return.

(Testimony of Harry O. Swanson.)

Q. Explain that to the Court. There may be someone who doesn't understand that.

A. Under the community property laws of the State of Washington taxpayers, insofar as the income is community income, are entitled to divide it and file it between two returns, the husband's return and the wife's return.

Q. Then on the three years that we are talking about, that is, 1943, 1944 and 1945, each of John Barcott's returns were community property returns? A. That's right.

Q. And a similar return for the same amount was returned by Katie Barcott, his wife?

A. That's right.

Q. All right, now state how you recapitulated from these figures to find what his accrued income tax should have been.

A. For the year 1943, as I stated previously, the increase in net worth was \$21,928.10, to which have been added certain expenditures which are not deductible. Life insurance premiums in the amount of \$230—— [92]

Q. Where did you receive that figure?

A. From the records of the Prudential Life Insurance Company, Tacoma.

Q. That he paid \$230 a year life insurance premiums? A. That's right.

Q. All right.

A. And during the year 1943, he paid Federal income taxes of \$2,654.56.

(Testimony of Harry O. Swanson.)

Q. Now did he pay that, or that was for him and his wife?

A. That was paid for him and his wife, since the total net worth has been computed for both.

Q. Yes, all right.

A. Those two items are not deductible expenditures, and have been added to the increase in net worth, giving the corrected income on the net worth basis for the year 1943 of \$24,812.66, as against the total net income reported of \$13,440.79.

Q. Making a difference of—

A. Making a difference of \$11,371.87 for the year 1943.

Q. That is unreported income.

A. That's right.

Q. Now that—does that include anything for living expenses of any kind, of clothing or anything else?      A. It does not. [93]

Mr. Gagliardi: Your Honor, I am objecting to counsel leading this witness and putting all the answers in his mouth.

Mr. Pomeroy: Well, if the Court please, I don't—I am sorry if I have been leading—

The Court: Let's proceed.

Mr. Pomeroy: —but he knows more about it than I do. What was my last question?

(Question read.)

Q. In other words, if he had spent anything for food, or clothing, it would increase the amount that you would claim, is that right?

(Testimony of Harry O. Swanson.)

Mr. Gagliardi: I am objecting, your Honor, again he——

The Court: Objection will be overruled.

A. Any amounts which have been expended for personal living expenses are not deductible. They would serve to increase the income, yes.

Q. But you have not included any of that in the——

A. I have added nothing for his living expenses, no, sir.

Q. Now, if you will please recapitulate as to the income tax for the year—calendar year 1944.

A. You mean the income tax or the income?

Q. The income, including the income tax—just the income.

A. As I stated previously, the increase in the net worth for the year 1944 was \$18,256.09, to which has been added the unallowable life insurance premiums of \$230 and the Federal income taxes paid of \$2,367.12, giving a corrected net income on the net worth basis, of \$20,853.21, as against the net income reported of \$12,265.13, or an understatement of \$8,588.08.

Q. Now tell us then, and recapitulate for the calendar year 1945.

A. The net increase in net worth as I reported before, is \$18,853.85, to which is added the life insurance premiums of \$230 and Federal income taxes paid of \$4,193.98, giving a corrected income on the net worth basis, of \$23,277.83, as against the net income reported of \$15,777.95—between—\$15,777.95, or an understatement of income of \$7,499.88.

(Testimony of Harry O. Swanson.)

Q. Basing your deductions on—for the calendar year 1943, on the understatement of income which is chargeable, \$11,371.87, how much of an income and victory tax would there be due on that?

A. Well, that understatement, divided between the husband and the wife, on the community property basis, and the corrected income tax income of John Barcott, is \$12,406.33. [95] and a corrected victory tax of \$12,551.94, and the corrected tax liability of \$3,646.25, as against \$1,545.38 reported on the return, or a deficiency in income tax of \$2,100.87.

Q. For the calendar year 1944, using your figures showing an understatement of income of \$8,588.08, what is the income tax that he should have paid there?      A. \$2,727.85.

Q. Using your figures and deductions as of—for the calendar year 1945, showing an understatement of income of \$7,499.88, what income tax should John Barcott have paid for that?      A. \$3,201.96.

Mr. Pomeroy: You may inquire.

The Court: It is now time for the afternoon intermission, so we will take the intermission. The audience will remain seated while the jury pass to the jury room for a 15-minute recess.

(Recess.)

The Court: Are you finished with your direct examination?

Mr. Pomeroy: Yes, I said—— [96]



(Testimony of Harry O. Swanson.)

Cross-Examination

By Mr. Gagliardi:

Q. Mr. Swanson, the first time you met Mr. Barcott was February 13, 1946. A. That's right.

Q. And on that date he came to your office in the Puget Sound Bank Building.

A. That's right.

Q. And at that time you requested him to check the safe deposit box. A. That's right.

Q. The contents to inventory them.

A. That's right.

Q. And he had no hesitancy, he let you go into the box. A. No, sir.

Q. You advised him at that time also that he was free to refuse you that permission?

A. That's right.

Q. He say he have nothing to conceal, he was glad to show it to you.

A. He said he would be glad to show it to us.

Q. And then you went to the box. That was the first time you opened that box?

A. That's right. [97]

Q. That's the first time you saw what was in that box? A. That's right.

Q. And in inventorying the contents of the box you found something like \$75,000 worth war bond?

A. That's right.

Q. \$23,200—— A. \$23,000.

Q. \$23,000 in cash. A. That's right.

(Testimony of Harry O. Swanson.)

Q. Then you examined the date of the war bonds.      A. That's right.

Q. And after you examined the date, you assumed that Mr. Barcott, all he had in that box in December 31, 1942, was \$23,000.

A. That's right.

Q. You had no other information but your own assumption.      A. That's right.

Q. Then the bonds were purchased after January 1, 1943. The bonds that you inventoried were purchased after January 1, 1943.

A. No, sir, that's not quite true. We inventoried all that were in the box, some were purchased prior to that date.

Q. Some were purchased prior to that date, and some were purchased prior—after that date. [98]

A. Yes, that's right.

Q. Those who were purchased prior to that date, you assumed that he had them before January 1, 1943.

A. We—from the issue date we determined they were purchased at a certain time, and if they were issued prior to January 1, 1943, we assumed they were purchased prior to January 1, 1943.

Q. And what he purchased after January 1, 1943, then you assumed he purchased on that time.

A. At the issue date, yes, sir.

Q. Issue date. And you assumed that he got that money from the business.

A. Yes, I had no other knowledge.

(Testimony of Harry O. Swanson.)

Q. You had no other knowledge, you made no other inquiry.

A. I made other inquiry, yes sir.

Q. Where did you inquire?

A. We inquired from Mr. Barcott, he was asked numerous times after the first contact if he had any other source of income.

Q. Just asked the sources of income.

A. That's right.

Q. Did he tell you that he had been in business since 1919?

A. That's right.

Q. That he, his wife, and his son, operate the restaurant [99] since 1919 continuously, the California Oyster House.

A. I am not sure about the other members of his family, but he said that he had operated the restaurant——

Q. Didn't he say he and his wife and the two sons operate it?

A. He said his wife had been there part of the time.

Q. Yeah. You in determining the net worth of Mr. Barcott assumed that in January 1, 1943, he only had \$23,000 in cash, and whatever bond he had purchased prior to that time, and also the real estate and the restaurant.

A. That was all, yes.

Q. And that's purely assumption. There is nothing upon which you could base any facts.

A. Oh yes, they were assets which were examined.

(Testimony of Harry O. Swanson.)

Q. Were examined.

A. Purchased at a certain date.

Q. And because they were purchased on a certain date, then you assumed they were acquired by earning after that date—prior to that date.

A. Prior to that date.

Q. And it must have been earned before the—between the first of January and the date in which they were purchased in 1943? See if I make myself clear. Any bond which he purchased during the year 1943, you assumed that was income that he received from the first of January [100] during the year up to the date he purchased the bond.

A. That's right.

Q. You had no information whatever what asset that Mr. Barcott had prior to January 1, 1943, whether it was in cash, bond, mortgages or other property.

A. Well, that's not true.

Q. Do you have any information——

A. We examined the savings accounts back to the time that he first started, then we examined the conditional sales contract back to the time he started, then the real estate contract, and such bonds that were still in the box—the inventory date, if they were purchased prior to January 1, 1943, they were examined.

Q. But so far as pertaining to the cash in which he purchased additional bond in 1943, and additional bond in 1944 and '45, you had no informa-

(Testimony of Harry O. Swanson.)

tion where the money came from except what you assumed that it came from the business.

A. I assumed it came from the business.

Q. Yeah. And whether or not Mr. Barcott in a period of thirty years, or twenty-nine years, had accumulated all this money and during the war purchased war bond, you did not know, or you do not know to this day.

A. I have very good reason to believe that he could not [101] have had it on hand.

Q. Well, I don't care for the reason, Mr. Swanson. I wonder if you have any knowledge as to whether or not Mr. Barcott during prior to January 1, 1943, had not accumulated a sufficient estate to purchase bond when the Government needed the money.

A. I didn't know Mr. Barcott at that time.

Q. You did not? During that time, Mr. Swanson, it was customary for the Government to make issue of these bond periodically, in appealing to the public to buy bond at that particular time, was it not?

A. That's right, during the war, yes——

Q. And those bond that he was purchasing, was on those date on which the Government was appealing to purchase the bond, as a new issue was put into the market, wasn't it?

A. I don't know. I don't know the issue dates that the Government appealed——

(Testimony of Harry O. Swanson.)

Q. I thought you looked at the issue dates. But you recall that the Government from time to time made a new issue bond and appealed to the public to purchase them.

A. Yes, they had war bond drives, if that's what you mean.

Q. Yeah, war bond drive. Did you check those bond as to whether or not those bond were not bought during this period when the Government was requesting, if not [102] directing, that the citizens purchase the bond?

A. All I checked was the fact the bonds were issued at a certain date.

Q. That's all. And by reason of that you concluded that he earned that money during that time.

A. That's when the visible assets came into existence.

Q. That's the time when you saw the visible asset in 1946.

A. That's right.

Q. And did you examine the book of Mr. Barcott, as to the book that he was keeping in 1943, '44 and '45, did you examine his daily cash as well as expenses?

A. I ran through them.

Q. Yeah. Is that a fact that he didn't have much money?

A. His books did not reflect that.

Q. You inquired from Mr. Barcott to also show you all of the vouchers of his purchase, if he had any. Didn't you?

A. That's right.

(Testimony of Harry O. Swanson.)

Q. And also inquired from him to allow you to check the restaurant receipts for two weeks.

A. That's right.

Q. And did he allow you to do that?

A. He did that.

Q. Yes, and you checked all his records. [103]

A. He had no vouchers.

Q. Well, he had no voucher because everything he was doing, transacted business in cash.

A. That's right.

Q. He allowed you to run the restaurant for him for two weeks.

A. No, I didn't run his restaurant.

Q. I don't mean run it, but check the restaurant for two weeks.

A. I requested him to keep his sales tickets for a period of two weeks.

Q. Yeah. And he kept them. And you went there from time to time to watch and see whether those tickets had been kept.

A. No sir, we went there at the end of two weeks and received the tickets.

Q. You received the ticket. And how did they compare with the receipt that he showed in the book he was keeping? A. They didn't.

Q. How did they compare, favorably or unfavorably. A. May I refresh my memory?

Q. Yes, we want to get the facts.

A. During this period from February 12th through February 26th, 1946, the sales tickets totaled \$4,402.47; the [104] cash register for that



(Testimony of Harry O. Swanson.)

period for his sales record, showed \$4,158.90, or a difference between the cash register and the sales tickets of \$243.55 for a period of two weeks. In other words, the cash register was short by \$243.55 from the sales tickets.

Q. And Mr. Barcott furnished that information himself?      A. That's right.

Q. He gave you the ticket as well as he gave you the sales slip from the—records from the cash register?      A. That's right.

Q. And either the cash register was faulty, or somebody was stealing, was that it?

A. As near as Mr. Barcott could explain it was, that someone was dipping into the cash during that period.

Mr. Gagliardi: That's all.

Mr. Pomeroy: Just a minute, Mr. Swanson.

### Redirect Examination

By Mr. Pomeroy:

Q. You were asked how you knew that Mr. Barcott did not have any more cash on hand on December 31, 1942, than \$23,000 which you gave him the benefit of the doubt by saying he had on hand. Tell what—tell what records you examined in order to determine that he could not [105] have had any more cash on hand.

A. I examined the records of the Collector of Internal Revenue in Tacoma, for the period 1919 through 1942, to determine what income taxes had been paid during that period by Mr. Barcott.



(Testimony of Harry O. Swanson.)

Q. And after you received this information as to the amount of tax paid by Mr. Barcott from 1919 to 1942, did you make a list of what his income was from 1919 to 1942?

A. I made a determination in order to try to compare my opening net worth with what he could have purported from his income tax returns. From 9—may I go ahead?

Q. Go ahead.

A. From 1919 through 1942, Mr. Barcott only reported tax in four years; 1929, \$12.07; 1936, \$17.25; 1937, \$3.81; and 1938, \$10.29; and in 1942 he reported taxable income of \$8,236.30. I don't have the tax paid for '42, since that was a forgiveness year in—when the Return Tax Payment act became effective.

Q. And then, from those figures you determined what his maximum income would have been on those tax figures, is that correct?

A. Yes, a person is liable for tax, an individual, in amount in excess of his personal exemptions. I allowed Mr. Barcott a marital exemption in each one of the years, [106] a credit for dependents in each one of the years. Now, in the years he paid no tax, which were all the years from 1919 through 1942, except the six years I have mentioned, he paid no tax, and I allowed him the full amount of the personal exemptions. From the years 1919 through 1942, the maximum taxable income based on the returns which he filed for those years could have been \$89,291.09 for the twenty-four years,

(Testimony of Harry O. Swanson.)

under the assumption that he made the maximum in each one of the several years. During those years it cost Mr. Barcott and family something to live, and I estimated his living expenses at \$125 a month during those periods, for his wife and his family, for the period of the twenty-four years, which would give him a reduction in the estimated income of \$36,000. On that basis he had a possible net worth, based on the income tax returns which he filed from 1919 through 1942, of \$53,000. That against the net worth which I start in my computation of \$57,278; in other words, my opening net worth was greater than I determined on this maximum basis. [107]

#### Recross-Examination

By Mr. Gagliardi:

Q. Mr. Swanson, you have the amount which was exempted each year?           A. Yes, I do.

Q. And the total amount of exemption would make \$89,000.

A. Except, Mr. Gagliardi, except in the years in which he paid the tax, I determined what the taxable income was and allowed him the additional amount.

Q. You allowed the additional amount and determined income of Mr. Barcott from 1919.

A. That's right.

Q. You started from 1919——

A. That's right.

Q. ——or 1920?           A. 1919.

(Testimony of Harry O. Swanson.)

Q. To—— A. Through 1942.

Q. To December 31st, inclusive, 1942, was the maximum amount of \$89,000.

A. That's right.

Q. On which he didn't have to pay any taxes.

A. No, some of those years he paid some tax. A small amount.

Q. In some he paid some taxes. Then you allow him expenses [108] of \$125 a month to live on?

A. That's right.

Q. That is in taking consideration he was run a restaurant and the whole family eating there——

A. Well, really, eating in the restaurant, you can't deduct that from your taxable income, Mr. Gagliardi.

Q. I realize that. But we don't have very many restaurant men that charge themselves a meal, do you?

A. I think so, Mr. Barcott—or Mr. Gagliardi, and the law requires that you do. To the extent that you eat in a restaurant, that's taxable income.

Q. Did you take in consideration also the earning of Mrs. Barcott during those years in which she was working in the restaurant from 1919 to 1936?

A. To the extent that she had any earnings in the restaurant it would be community income and taxable just as though it had been earned by Mr. Barcott.

Q. But you made an allowance a hundred and twenty-five dollars a month that Mr. Barcott and his family must have spent.

A. That's right.

(Testimony of Harry O. Swanson.)

Q. If he didn't spend that \$125 or they had some other income in which they lived, then they would have earned \$89,000, wouldn't they? [109]

A. Well, if he made—accumulated more than the \$53,000, he would have had to pay some tax in the years in which he paid no tax, from 1919 through 1942.

Q. Assuming, Mr. Swanson, that he had, and his wife had, some independent sources upon which they lived, which you could not classify either income, or at any event it would not be a criminal offense not to report it, he would have earned \$89,000, if he had some other sources of revenue in which he was living on.

A. Yeah, if there were other sources they were still taxable.

Q. If he didn't pay any taxes, then, I mean that those years they were violating the law then.

A. Yes, he wasn't reporting at all in those years, he was violating the law as well as anyone later would be violating the law.

Q. Yeah, but in assuming a hundred and twenty-five dollars a month, you assume that these people lived to the station in life in which to spend that much money, even during depression.

A. I believe that he did pay that much.

Q. Yeah, but if no expense were deducted at all—that's the only answer I want to get from you—that the expenses came from other sources

(Testimony of Harry O. Swanson.)

which we are able to account, [110] then Mr. Barcott in January 1, 1943, would have \$89,000 of asset, wouldn't he?

A. I stated that this was the maximum——

Q. The maximum. He could have——

A. He could have had that.

Q. Yeah.

A. If he hadn't spent a cent on living.

Q. Each year of this tax, you have in your report how much a man is entitled to earn or receive before he makes a report for income tax?

A. Yes sir.

Q. And each year also that he pay tax you give him credit for what he paid the taxes?

A. That's right.

Q. And six years he paid taxes. In the year 1929, how much was the tax? A. \$12.07.

Q. How much would the earning be?

A. \$4,900—\$4,950 roughly. Four thousand, nine hundred——

Q. And that's besides the exemption?

A. That's the maximum.

Q. Maximum—from that you deducted the exemption?

A. From that you deduct the exemptions of \$4,700.

Q. How much? [111]

A. Forty-seven hundred dollars.

Q. Forty-seven. What was the rate of taxation in those years? A. A half of one percent.

Q. One half of one percent. And that would make then twelve dollars. A. \$12.07.

(Testimony of Harry O. Swanson.)

Q. And also then, you assume that when he went to business in 1919 he didn't have any money?

A. That's right, under this computation.

Q. And also you assume that Mrs. Barcott—

A. May I clarify that, just a second? I stated at the beginning that this was determined from the records of the Collector of Internal Revenue, and that is the first year for which they had a record of a return being filed. Now, it might be that he had filed prior to that.

Q. I see, but in 1919 when he went into business, you have no knowledge of how much money he had to start in business? A. No sir.

Q. And you did not know how much money Mrs. Barcott had? A. No sir.

Q. And you didn't know how much Mrs. Barcott's mother left her when she died, did you?

A. No sir. Mr. Barcott was asked for the information—rather, that information, but he never volunteered it.

Q. All of these taxes that you have given the Court and jury the benefit of knowing that were not paid, were on the assumption that Mr. Barcott had nothing else on January 1, 1943, except what you say was in the box, at that time.

A. A tax is computed on the increase of certain items.

Q. Increase during those years.

A. During those years, not—it wouldn't matter a bit if the amount was less. It's only on the increase that a man makes from the beginning of the

(Testimony of Harry O. Swanson.)

year and the end of the year. So the amount that you start with is of little or no consequence for the purpose of determining the increase of that year.

Q. And the increase, you mean to say, the additional asset acquired during the year?

A. That's right.

Q. And where the money came from, you have no knowledge, except what you assume it came from the business.

A. We—as far as we know, it came from the business, and we had no other source to the amount during those years.

Q. You have no other knowledge——

A. 1943, '44 and '45. No sir, except from the dividends [113] and interest.

Mr. Gagliardi: That's all.

The Clerk: Plaintiff's Exhibit No. 14, for identification.

### Redirect Examination

By Mr. Pomeroy:

Q. I am handing you what is marked for identification as Plaintiff's Exhibit No. 14. I will ask you to state what that is, if you know.

A. It's an agreement between John Barcott and the Fishermen's Packing Corporation, dated on May 22nd, 1940.

Q. Did you see that before?

A. I looked at this when I was going through some records of the Fishermen's Packing Corporation, yes sir.



(Testimony of Harry O. Swanson.)

Q. And that is a note, is it not, of indebtedness of Mr. Barcott?

A. It's an agreement in the settling of a note.

Q. Settling of a note.

A. That's right.

Q. And when did—in computing your figures, when did Mr. Barcott pay off that note?

A. Mr. Barcott did not pay off the note as such. We took a reduction in the stock interest which he had in the [114] Fishermen's Packing Corporation.

Q. And when was that?

A. During the year 1940, in May, I believe.

Q. How long had he owed that obligation?

A. Apparently since 1932, when he acquired his stock interest.

Q. And how much was that obligation?

A. Two hundred dollars.

Q. And from 1932 to 1940, he did not pay this obligation of two hundred dollars, is that correct?

A. That's what the statement says.

Mr. Pomeroy: I'll offer Exhibit No.—what is it?

The Clerk: Fourteen.

Mr. Pomeroy: Fourteen.

Mr. Gagliardi: I object, incompetent, irrelevant and immaterial, 1932, two hundred dollars.

The Court: Oh, I think I shall admit it conditionally. From the cross-examination of the witness there was a certain inference there might have been other sources of income. If there was such



(Testimony of Harry O. Swanson.)

testimony in the defense, that would become competent in rebuttal. If there isn't such testimony I will entertain a motion to strike. I don't know why the witness [115] should be held for that.

Mr. Gagliardi: All right, Your Honor. I think Your Honor is correct on that, because surely in cross-examination the agreement itself is sure one of those agreement where a person agrees to purchase stock and then he takes less shares of stock and which forfeits the rest of it when we—

The Court: It will be admitted with the understanding a copy may be substituted if it is an original record.

(Whereupon, the agreement referred to, between Mr. Barcott and the Fishermen's Packing Corporation, was admitted in evidence as Plaintiff's Exhibit No. 14.)

Mr. Gagliardi: May I see the copy?

Mr. Pomeroy: This is a certified copy.

The Clerk: Plaintiff's Exhibit No. 15, for identification. Plaintiff's Exhibit No. 16, for identification.

Mr. Pomeroy: You may step down.

(Witness excused.) [116]

The Clerk: Plaintiff's Exhibit No. 17 for identification.

Mr. Pomeroy: If the Court please, at this time I offer Exhibits 15, 16 and 17, they are certified copies from the Pierce County Auditor, as to these transactions concerning real estate. The reason I

didn't offer them earlier is the fact that we just got them, your Honor. It took some little time to get the Auditor to get them out. And they are the same things that were testified to by the last witness as being some of the things he examined in making his report.

Mr. Gagliardi: I fail to recognize, your Honor, I don't know the purpose except of cluttering the record. Nobody denied that this property he purchased and sold and all that. They make no claim that he made a profit on this sale of property, I don't think, do you?

Mr. Pomeroy: No.

Mr. Gagliardi: Well, there's no profit in this. It is merely cluttering the record. I don't know why it should be admitted in evidence. I don't know why I should object, but it seems to me it confuse the issue, with the instruments when they are in record.

Nobody denied that we had this [117] lot and we sold it. That's all there's to that. And the deed shows that we sold it. If we denied that he sold it, it would be different.

The Court: If they are not material, there is no use to——

Mr. Pomeroy: Are you objecting to them?

Mr. Gagliardi: I am objecting on the ground it is irrelevant and immaterial and merely cluttering the record.

Mr. Pomeroy: They show transactions during the year 1943, '44 and '45 of real estate, by John Barcott, and are part of the record examined by the revenue agent, in computing the figures which he was permitted to testify to here.

The Court: Oh, I think I will admit that.

Mr. Gagliardi: I withdraw my objection if it will make any argument over it.

(Whereupon the certified copies of real estate transactions, taken from the records of the Pierce County Auditor, were admitted in evidence as Plaintiff's Exhibits Nos. 15, 16 and 17, respectively.)

Mr. Pomeroy: The Government rests. [118]

Mr. Gagliardi: If your Honor please, I think that the defendant at this time requests the Court may excuse the jury. I have a very important question of law to present to your Honor. Mr. Ursich and Mr. Hale will present for the rest of the afternoon.

The Court: Well, it is nearly adjourning time, anyway, so I think I shall excuse the jurors until 10:00 tomorrow morning.

You will remember the admonition I gave you at the opening of the trial with reference to talking to anybody or permitting anybody to talk to you about this case. Just go your way now and forget you are jurors until time to report here tomorrow at 10:00 o'clock, and I will excuse you.

(Whereupon the jurors retired from the court room.)

Now you may proceed.

Mr. Ursich: If your Honor please, at this time we are asking this Court to either dismiss this case, or in the alternative to ask the jury to return a verdict of—a judgment of acquittal against the de-

fendant, John Barcott, on the ground and for the reason that the Government has failed to introduce sufficient evidence to show that he has committed the [119] crimes with which he is charged in the indictment.

Your Honor realizes that this is a criminal case, charging the defendant with the commission of a felony. Your Honor further realizes the rules that are applicable in criminal cases; namely, that there has to be evidence introduced of each and every fact before the case can be submitted to the jury for their speculation as to the guilt or innocence of the defendant.

Our taxation system has been so constructed that there is a gradation of penalties and interests, going all the way up until it subsequently reaches a felony level. But, negligence, mistake, or in cases where there is failure of proof, even though there may be a tax due, those cases do not come in under a criminal prosecution. They are matters that can be handled civilly, so far as net worth is concerned, we can see no reason why the Government might not, and as a matter it—in fact it does use a straight net worth basis for the proving of its cases for the collection of tax and penalties thereon. But that your Honor has nothing to do with a criminal case where you have to prove the defendant guilty beyond a reasonable doubt, and where you have to prove a guilty knowledge, [120] and prove each and every fact alleged in the indictment. As the cases have said, you've got to prove that there was a tax

due in those particular years, before the Government can come in and say that you have committed a crime.

Now, I say to your Honor, that you can't do that in a criminal case on a straight net worth basis. You can do it civilly. You should be able to do it civilly. But, you're coming in here—you've got to show a tax due. Now, in all the cases that we have examined, we haven't run in to any that find the defendant guilty in a criminal case on a straight net worth basis. There are cases which go very close to it, but there are none that are as scanty, or without evidence, to the extent that this case is.

You have had here one salient fact, and one only as I see it, and that is that in the years 1943 the defendant purchased some bonds. In the year 1944 he purchased some bonds. And, in the year 1945 he purchased more bonds. These bonds, these purchases of bonds are greater than the amount of his income for those three years. Therefore, the Government assumes, mind you, and only assumes that the income must have been earned during those three years. Now, I say to [121] your Honor, looking back during those three years, how many men would you have had facing the bar of criminal justice who bought the full maximum of bonds during those three years and never reported an income to equal the amount of the purchase of bonds. How many American citizens dipped into their savings during those years and made purchases greater than their income. They must number in the millions. And that's the basis of this case for

the Government; because the man bought more bonds during those years than he reported income, they assume and speculate that he must have made the money during those years. I submit to your Honor that's all you've got to go on in this case, and where are you going to determine that he owed a tax on that basis and on that basis alone.

Now, there are cases where the Government has actually shown certain items of income that have never been reported. They have actually been able, for example, to trace an item and say, "Here is an item which you received as income from that year. It has never been reported in your tax returns." Now there is specifically an item that they say has been received. There are lots of cases like that where they show an asset, money received, that wasn't reported, but they trace [122] it. In this case we have no case of income unreported which the Government has been able to put the finger on and say, "There is an income, an item of income unreported; therefore, you must have owed a tax on it." There is no income here. It's just a matter of outgo. Nothing more than the fact that there was a purchase of bonds in a greater sum than we earned. It is reasonable that this money was earned in a period of thirty years by this defendant. It is very reasonable that a great deal, if not all of that money, was purchased in years earlier. There is nothing from those reports that show that he violated—or that he failed to report his liability, his full tax liability to the Government from the failure—or, from the purchase of a greater amount of bonds than income that he had in those years.



There is not one case, I say again to your Honor, that we have been able to uncover, a criminal case I mean, I do not mean a civil case, that goes on a straight net worth basis and where they can't particularly point to a certain item of income that wasn't reported in the year in which they are trying to assess the man for the tax and which they are trying to find him guilty of a felony. [123]

I say again, income actually received, not reported, coupled with other facts, has made cases in criminal prosecution; but on a straight basis, not showing any income, just relying on an expenditure alone, saying he must have had more, how did he buy it, and I remind you, remind your Honor that this is a criminal case, that we do not have to explain, they have to prove. It's not a burden on the defendant to prove and to tell the Government whether or not he had this money beforehand. They've got to prove he didn't have it. And they've got to prove that the tax was due in those years.

Now, the evidence offered before your Honor today, is this of such a nature that this Court can say that there is only one hypothesis, and that is guilt? Can your Honor say that the purchase of more bonds in any of those three years indicates a fraud to the Government, and that there was a tax due during those years? I submit to your Honor that you can't, or any other living human being can so do. I have a case here—I feel there's no need to cite the name of the case, the books are full of the particular quotation with reference to whether or not a case should be sent to the jury on circumstantial evidence. [124]

Our courts have repeated this hundred of times in criminal cases. "Unless there is a substantial evidence——"

Mr. Pomeroy: What is the citation?

Mr. Ursich: Yoffey against United States, 153 Fed. 2nd, 570.

"——unless there is a substantial evidence of facts which excludes every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused, and where all the substantial evidence is in as consistence with innocence as with guilt, it is the duty of the appellant court to reverse the judgment of conviction." I cite that case only for that rule of law, and nothing else. It follows through our entire Federal jurisprudence.

Where a case is presented on circumstantial evidence, this Court has got to say that the evidence excludes every other hypothesis except guilt. This Court has to say that when John Barcott purchased more bonds in 1923 than he reported income, that that indicates exclusive of every other hypothesis that he defrauded the Government of the United States.

That's what your Honor has got to determine to submit this case to the jury. I submit to [125] your Honor that it isn't here. Well, there may be tax liability. I don't know. But, that's a different matter. Here you have a man who after thirty years of living in this city, conducting himself as an honorable man, comes before the bar of criminal justice. On what? On speculation, on inference, and



nothing more. It's just as reasonable that he made these purchases out of money that he acquired before. Your Honor is the guardian of the rights of the people. I feel that your Honor is familiar with all that I have told him today. I feel further that your Honor is not going to permit an infringement in the fields of criminal law on what I maintain is no evidence whatsoever.

It may be set out by some that there is some evidence. Assume that there is, without admitting, some evidence, it doesn't square with the hypotheses of guilt and nothing else. And that's what your Honor is bound to determine today.

If the defendant owes a tax, he's got to pay it. He's got to pay it with penalties, or whatever it is, but that's not the question today. We only have one question—did they make out a case? It's on circumstantial evidence, nothing else. The circumstances in this case are just as consistent with innocence as [126] they are with guilt. And being so, this Court can do only one thing, as I see it. It can determine that there has been no proof. If there is any tax due in those three years, the corpus of this case has not been established, and I ask the jury to render a judgment of acquittal.

I don't know whether Mr. Hale has something further to add on what I've said.

Mr. Hale: If the Court please, I think Mr. Ursich has covered the point quite thoroughly. However, I have one case I would like to invite your Honor's attention to. That is *Nicola vs. the United States*, an appeal from the Third Circuit, 72 Fed. 2nd, page 780.

In that case there was substantial evidence that the defendant had arbitrarily allotted to one of his corporations, a commission on the sale of patent rights in the sum of a hundred thousand dollars. And an argument arose as to whether or not he should have allotted this before the negotiations or afterwards. He frankly took the position that the bargaining did not have to proceed the actual transfer of the money. Now, the Court in reversing a conviction in the lower court—incidentally he wrote a letter, [127] although it wasn't admitted in evidence, but there was a controversy over the letter, but the allotment of various income in several corporations was referred to as "shifts" and "passings." At page 786 the Court says: "But if the shifts and passings represented facts and real transactions, the operation through his different corporations, rather than individually and personally, or the shift from operating through a particular corporation in one enterprise to another corporation in another enterprise, in order to lower his tax right, he was within his legal rights and was not guilty of violating the law.

"In view of the fact that there is no evidence showing that any entry in any or all of the books did not represent the fact which it purported to represent, or that there was an alteration of any entry or that there was a false entry in any of the books, it is reasonable and legal to infer that he made shifts and passings within the law." And they quote the elementary rule of criminal law.

“Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused.” I repeat this [128] language, “unless there is a substantial evidence of fact which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused. And where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction.”

This, if your Honor please, is an income tax case. Now what are the assumptions in which the Government engages here? The Government engages, in order to prepare its figures, that in 1919 John Barcott was absolutely penniless, without a dime, he didn't have anything, or perhaps he was suddenly materialized into existence on that date. The Government's principal witness, and there is reiterated in this Court, in this case, time and time and again, that this whole case is founded upon a theory of net worth. And the net worth is based upon the assumption that this income occurred in 1942, 1943 and 1944—I mean, the years '43, '44 and '45, solely because he purchased bonds during those years.

Now, is the Court at liberty to allow this jury to speculate upon a matter of that kind? That's all it amounts to. Is the Court at liberty to tell [129] the District Attorney of the United States that “if you can go out and find any men who has spent more money in a given year than his known assets,

you can send him to the penitentiary. Just find expenditures in excess of what you deem to be his income, and you don't need to prove anything else."

Now, if your Honor please, all of the cases which we have been able to find showed conclusively that the Government's case is bottomed on something. It's laid upon a foundation of a net worth as of a given date, and in establishing the case from there on they must show an increase in the net worth from that given date. Most of the cases showed bank statements. Most of the cases show that on a certain day the defendant told the bank in order to borrow money that he had so much money—listed his assets. And from there on in the Government, of course, can show income by cash in hand paid to them, by checks; and that coupled with large expenditures, establishes a net worth case.

Incidentally, if your Honor please, the term net worth is a catch phrase used by the Internal Revenue. It is not a judicial expression. That's how they characterize it, but the courts don't so characterize it. True, the expression is used, but [130] no court has said, "If we can show a net worth on a certain day, or if you can show a net worth on a certain day without showing income, that you got a case."

In the case at bar there is absolutely no predicate laid prior to January of 1943. That is all assumption. That's way up in the clouds. That's guess work. The Court would have to indulge in a negative assumption that this man—this man was penniless prior to that time, in order to submit this case to the jury.

Now this is a criminal case. Every element of the crime must be proved by the Government. We stand here presumed innocent throughout all stages of this trial. It seems to me, your Honor, that the Court has no alternative, no other alternative but to take this case from the jury at this time.

The Court: I shall have to deny the motion and allow you an exception, and I might state in passing that I am not finding fault with the argument advanced by either counsel as to what the law is, when we come to instruct the jury. The case cited by you, Mr. Hale, is a part of the substance of an instruction—the Court gives almost a stock instruction on the weight to be given circumstantial evidence when circumstantial evidence is relied upon, but in order to grant a motion [131] such as is made in this case, either to dismiss the action for want of proof or to direct a verdict of not guilty, the Court must assume that the proof is totally lacking in making an issue of fact for the trier of the facts to determine. Had the Court the responsibility of passing upon the facts that would be an entirely different situation and the argument would be very apropos. It is not for me to comment in passing whether this theory of so-called net worth is the proper basis under a set of facts such as are disclosed here, where there was a business that was, through the years that are mentioned here, apparently quite a profitable business, but such records as the Internal Revenue Department require from time to time—the testimony of one of the Internal Revenue agents was that they were not available—were not being kept.

Now whether the circumstance that the net worth year after year, through the three years here is one where you can say the inference is equally as great pointing towards innocence as it is guilt as a matter of law, is quite a different situation, and I couldn't say that because that is a question for the trier of the facts to determine under the proper instruction to be given. The question as to whether it will be a civil liability or a criminal liability is sometimes identical. The only difference there is, is, the weight of the [132] evidence. One is proof beyond all reasonable doubt and the other is proof by the greater weight of the evidence. In fact the case—and I can't give it to you at the moment—the Supreme Court of the United States passed upon that identical question where the taxpayer was tried and he was acquitted on a charge such as you have here. The department sought to levy the tax and the penalties—fifty per cent penalty, and the case went to the tax court in the first instance but finally wound up in the Supreme Court of the United States, and Justice Brandeis wrote the opinion and said that the criminal case is not *res adjudicata* of the civil case, even though the same charge is made. And so here, when we compare criminal liability with civil liability, we must always recognize the distinctions between the weight of evidence or the proof required, and the defendant must always in a criminal case be given the presumptions of innocence, but to say under the state of this record as made here now—and I must accept it because it is not controverted, that it leaves no issue of fact at all to the



trier of the facts would be an assumption of authority I am afraid that the Court hasn't the right to take, even in a criminal case, and I shall have to deny the motions—both motions and allow exceptions, and we will proceed with the defense tomorrow. [133]

How long do you think it will require for the defense, before you get the instructions?

Mr. Gagliardi: After the adjournment, your Honor, we may consult—we may not introduce any evidence, and we may. If we do introduce evidence it will take all day tomorrow. We may decide to stand on the record as it is made, because of our opinion concerning the sufficiency of the evidence, and may not have to have, but we won't know until morning. I want to consult with counsel.

The Court: Of course that is your privilege, but I would like, if you have any requested instructions that you want submitted to the jury, you get them. I would like to have them—the Government's, now.

Mr. Pomeroy: I will send them into your chambers.

The Court: And serve them on counsel.

Mr. Gagliardi: I will have them the first thing in the morning, your Honor. I don't know that they have prepared any instructions. There are two or three instructions I prepared, and I don't know how many more they have prepared themselves. We will have them early in the morning.

Mr. Ursich: If your Honor please. I have discussed this matter with Mr. Pomeroy of taking two or [134] three exhibits, so we may examine them this evening——

Mr. Pomeroy: I have no objection.

Mr. Ursich: There are some from the bank. We would like to look them over.

The Court: Yes. If there is nothing further, adjourn court until 10:00 o'clock tomorrow morning.

(Whereupon adjournment was taken until 10:00 o'clock a.m. October 31, 1947.) [135]

October 31, 1947, 10:00 o'Clock A.M.

The Court met pursuant to adjournment; all parties present.

The Court: Now, if there is nothing further before the jury comes in—Mr. Gagliardi, do you have anything further?

Mr. Gagliardi: I was going to ask, if Your Honor please, just a few minutes to renew our motion for non-suit. That is the requested instructions.

The Court: Are they in duplicate?

Mr. Gagliardi: I can give it to Your Honor in duplicate, but I have it—This is the original, Mr. Clerk.

The Court: Just pass them up.

Mr. Gagliardi: The defendant, I—if Your Honor please, I would like to renew our motion for dismissal of the action for the reason that the evidence were insufficient, or they are insufficient to submit it to the consideration of the jury. The argument made by counsel yesterday failed to point out to Your Honor a very important feature of the case, and that is this: This defendant is indicted for having reported less income than which he actually made, but the Government [136] limited the source



of this income, and that is the Government in the bill of particular, specified exactly where this income—this income came from, and that is first in this bill of particular, and the bill of particular is part of the indictment, and the Government must of necessity limit itself to prove an indictment no farther than that. We are not called upon to defend anything else.

Now, the indictment in the bill of particular says this: "The source of income were dividends from stockholding, Fishermen Packing Corporation of Anacortes; interest was from Government bond Series "G"; interest from saving account in the National Bank of Washington, and from a real estate contract and conditional sale contract for the sale of personal property, in each of which Anton Barcott was the purchaser; item interest on bond, was from the Government bond; item income from business, is from the restaurant business known as the California Oyster House, 940 Pacific Avenue, Tacoma, Washington."

Now, that's the indictment itself. And I say to Your Honor that there isn't a *single of* evidence that this income came from any sources. All the Government has here says that on January 1, 1943 [137] the defendant had a certain amount of assets, and that at the end of the year he had a larger amount of asset than his reported income. That not necessarily mean that this defendant derived this income from the restaurant, nor that he derived from this interest unless they prove it. Now, the interest amount is reported on the income itself.

The amount which the Government says he earned is reported, because it's in evidence. The amount of business reported from the California Oyster House is reported in that income tax return; but there is no evidence here wherein the Court could say to this jury that this defendant's income was from the California Oyster House and no other sources. And this is a criminal case. It is not a civil action. It's a man is put here in jeopardy for his liberty, and the Government must prove beyond a reasonable doubt every allegation in the complaint. And what are the allegations? That he derived this income from sources, the California Oyster House. And I defy counsel on the other side, or I defy any person, to point out a scintilla of evidence here that this income was from this sources and no other sources. Suppose he had some other business; suppose that he had [138] gambled; suppose that he stole the money; or suppose that he had some other income from some other sources which he should pay tax on it; yet, it is not reported and it is not made in the indictment, and Your Honor has no right to send this case to the jury and say to the jury, "You speculate, conjecture, wherein this income come from." The proof must be certain, the proof must be beyond a reasonable doubt, and the function of the Court is to the jury—take the case away from the jury when there is no evidence upon which to base a verdict.

What are the evidence here? Not a scintilla of evidence, Your Honor, that this income was derived from the California Oyster House, or any other

evidence. All the Government bases his income—his case wholly on net worth. Then he says on the first of the period which we are indicating this defendant, he had assets to a certain amount, at the end of the period he had—his assets were a certain amount, therefore his income was somewhere else. But where? From what sources?

We are asked in the bill of particular to tell us what sources we derived this income. And they come to and says, "this is the sources which you derived it." But, they failed to prove it.

And I say to Your Honor, sincerely, after [139] giving all this thought, and all night, that there isn't a scintilla of evidence, in justifying this case to be sent to the jury to speculate as to whether or not this defendant actually made that money in that restaurant or whether he got it some other places.

If he did get it in some other places, if the evidence were here that he got it from some other places, it would be your duty to tell the jury that was not admissible. He was bound to confine itself within the indictment, and no further; within the bill of particular, and no farther. And I say, Your Honor, that the evidence here is nothing. I've witnessed nothing in my thirty-two year of practice of law, I never find a case where the jury would be allowed to speculate, to conjecture, to guess, and to say that this come from a restaurant when there isn't a scintilla of evidence, and not a word that it was come from this particular sources.

I say, Your Honor, that the motion for non-suit, a dismissal, should be granted.

The Court: Mr. Gagliardi, I may say that when the motion for a bill of particulars was made here, the Court was in grave doubt whether a bill of particulars should have been furnished. Granting or denying the bill of particulars is a purely discretionary [140] matter with the Court, but in this case there was grave doubt as to whether the Government could particularize with the degree that it frequently can when it makes a charge, because the defendant himself, not having kept his books of account and records, in compliance with the Internal Revenue law, on the civil side, and in the regulations that are made for the enforcement of the Internal Revenue law, and I think an examination of the record when this application for the bill of particulars was before the Court, would indicate the Court did not mean to so limit evidence that upon the indictment itself, proof could no be made to support the allegations of the indictment.

I might suggest to counsel that in the earlier days of the practice of criminal law, the office of a bill of particulars in the Federal Courts was more strictly construed than it is under the new rules of criminal procedure, and likewise under the new rules of civil procedure. The Government is not required to prove the shortage in the return was the exact sum that was set forth.

Mr. Gagliardi: I think Your Honor construes the law more liberally than counsel for the Government. The Government says that it must be a [141] substantial amount, and whether a substantial amount is not fifty dollars or seventy-five dollars

when we are charged here with defrauding the Government of five or six thousand dollars, you cannot base a criminal prosecution on that basis alone.

The Court: I don't know what the Government said in that regard. I was just pointing out to you that it is not incumbent upon the Government in this charge to prove the exact figures.

Mr. Gagliardi: Your Honor mean to say then that the bill of particulars may deceive the defendant in believing that is all he must confront himself with, to prove and disprove; that the bill of particulars may be——

The Court: I am not dealing in generalities, Mr. Gagliardi: I am speaking of the case that we have before us, and the way that that motion for a bill of particulars arose.

Your motion will have to be denied and an exception allowed. Bring in the jury, Mr. Bailiff.

(Whereupon, the jurors resumed their seats.)

The Court: Now you may proceed with the defense. [142]

Mr. Ursich: If Your Honor please, ladies and gentlemen of the jury, yesterday you heard the Government put on its case, purported to prove the defendant, John Barcott, attempting to show to you that he had wilfully and knowingly attempted to defeat and evade his taxes for the years 1943, 1944 and 1945.

Although this attempt on the part of the Government to prove that—those facts is, we believe, based completely on conjecture, speculation, and as-

sumption, and nothing else, we still want to introduce evidence to you people to show you that even, that speculation, and that conjecture——

Mr. Pomeroy: If the Court please, I'll object at this time. I think this is for the purpose of showing what evidence he is going to put on.

The Court: Yes.

Mr. Ursich: We intend to prove to you this morning by the—that the defendant, John Barcott, in the year 1945—or, 1919 entered the restaurant business in the City of Tacoma, the same restaurant which he now has, the California Oyster House, that at the time he entered into that business he had [143] a certain amount of money which he had previously earned. Not a great amount of money, but about five or six or seven thousand dollars—I don't know exactly, but the proof will be shown in that respect—but he had that money when he went into the restaurant business in 1919; that he went into that business and he continued through it up to the present date, or until his son came back from the service and has taken over the business.

The evidence further shows, that during all these years that John Barcott was actively engaged in the operation of that business; that he worked there days, year in and year out; that his wife worked there, from the year 1920 until the year 1938; that in the year 1928 his son, who was fourteen years of age, came down to the restaurant and that he worked in that restaurant up until the time that war was declared and when he went into the service, and that he is now back there again.



The evidence will show that these people lived very, very frugally. It will be pointed out to you that in, during all of this time the defendant has never owned an automobile, that he has no vices of any kind, no place where he spends any money. It will further be shown to you that the defendant's wife ran a [144] very close home; that clothing for the children was even in the early years purchased from second-hand sources; and that these people were thrifty, and in the highest type of legality have over a period of twenty-five or thirty years accumulated a little money.

The evidence will further show that in all these years that this business was being operated that the defendant was making money, two hundred and fifty, or three hundred and fifty, or four hundred dollars a month. Time has gone by, many years have gone by, and it's difficult to tell what the earnings were for any month; but the—generally it can be said that this business made some money through the efforts of this family, every month he made a substantial amount, which money was not spent, but which money was carefully saved over a period of many years.

The evidence will further show that at the time Mrs. Barcott married this defendant that she had approximately six thousand dollars in cash which was put together with what the defendant had at the time.

We will further show you that sometime in the late twenties the defendant received the sum of twenty-five hundred dollars at the time of the death

of Mrs. Barcott's mother. Also during this time, somewhere in the late—1929, we will show you that Mr. Barcott purchased an interest in a fishing boat for approximately five thousand dollars, and that he had an interest in that boat for seven or eight or nine years, that during that time he made eight or nine thousand dollars, that is, he received from that boat eight or nine thousand dollars from his earnings, approximately; that he did sell the boat subsequently at a loss—he lost three thousand or thirty-five hundred dollars from the actual sale price of the boat, but that during those years he did have an income from it that amounted to eight or nine—maybe ten, I don't want to say just what, without knowing. It's been a long time ago.

But we will show you that the defendant had these sources of income in the early days. We will show you further that during the years that Mrs. Barcott spent in that restaurant that she received a source of income which she did not, and Mr. Barcott, did not report to the Government. Maybe they were supposed to report it, but they never thought that the money she received from tips was reportable income. Mrs. Barcott was in that restaurant for eighteen years, and the testament—testimony will show from the evidence introduced here [146] that at that restaurant she was able to make anywhere from five to ten dollars a day, sometimes more, in tips, in gratuities that were given to her from patrons in that restaurant. She will show to



you by her testimony that this money was used to operate all of the expenses of the family and that there was even some left over, a good deal was left over, was returned to Mr. Barcott and it would go in the savings, and that none of the money which they got from the restaurant, actual restaurant operation, had to be used for family purposes or for living purposes.

The evidence will show that over a period of that time that money amounted to a considerable amount, thirty to forty thousand dollars, that she received during the eighteen years, during her efforts in operating that Oyster House.

So, when we complete our case, I think we will show to you conclusively that the present worth that the defendant has was not acquired, as the Government would have, tell you, was not acquired during the years '43, '44 and '45, but was acquired over a period of twenty some odd years by the diligent effort of Mr. Barcott and Mrs. Barcott, and that a good portion of that income was saved by reason of the fact that [147] Mrs. Barcott was in that restaurant for eighteen years as a waitress and that she received substantial moneys in tips, which made it possible for these people to accumulate by the year 1942, or before this was brought, total assets of ninety or a hundred thousand dollars, or sixty to sixty-five thousand dollars was payable.

And when you've heard us, ladies and gentlemen, we expect you to return a verdict of "Not Guilty" and return this man back to his family.

## JOHN BARCOTT

the defendant, after being first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Gagliardi:

Q. State your name to the Court and jury.

A. John Barcott.

Q. How old are you?           A. Fifty-four.

Q. Mr. Barcott, where were you born?

A. I was born in Yugoslavia.

Q. When did you come to Tacoma?

A. 1913.

Q. And when you came to Tacoma, what business, if any, or [148] what occupation did you enter into?

A. I went a fishin'.

Q. What do you mean, fishing business?

A. Fish—in the fish business and Forsama—I was fishing with—on the “Forsama.”

Q. You mean you went out on the sea fishing?

A. Yes.

Q. Fishing vessel? With other crew?

A. Yes.

Q. And for how long a period of time did you do fishing?

A. From 1913 to part of a 1919, before I went to business.

Q. And in 1919, did you go in any other business?

A. Yeah, in 1919 I went in a business.

(Testimony of John Barcott.)

Q. What kind of a business?

A. A restaurant business.

Q. How much money or cash did you have at the time that you entered the restaurant business, which you earned in the fishing business?

A. I got about six thousand dollars.

Q. Six thousand dollars. And did you go into the restaurant business—did you buy a restaurant which was already in existence?

A. Yes.

Q. Who did you buy it from? [149]

A. I buy it from the fella—he's a Greek fella.

Q. Do you recall his name?

A. Huh?

Q. Do you recall his name?

A. His name was—the first name I knows a Gus, but I can't tell you last name.

Q. And did you pay for the restaurant?

A. Yes, sir.

Q. How much investment did you make when you purchased the restaurant?

A. Well, it cost about three thousand dollars.

Q. And who purchased the restaurant, you and anybody else?

A. There was a fellas with me.

Q. There was a fellow with you?

A. Yeah.

Q. Was he a cook?

A. Yes.

Q. And did you take him as a partner—

A. Yes.

Q. —to go in business together? And how much you two spend, about three thousand dollars?

A. Three thousand dollar.

(Testimony of John Barcott.)

Q. How much was your investment?

A. All my investment was there. [150]

Q. Well, who advanced the money then, for the purchase?

A. I'm the one that financed the money.

Q. And how long did you stay in restaurant partnership with this man?

A. Well, about three or four months.

Q. Three or four months. Who was the man?

A. It's Vincent—Vin—I can't tell you last name, you know.

Q. Victor. Was he a Greek fella?

A. Well, no, he was Slavonian fella.

Q. Slavonian. You recall his name?

A. Yeah, Vince—Gomway, something like—I can't tell you who—really his last name.

Q. After three or four months then, did you purchase this interest in the restaurant?

A. Yeah.

Q. How much you paid him? If anything?

A. I never paid him, not a thing.

Q. He then left the restaurant with the amount which you paid.

A. He left the restaurant, yeah.

Q. Did you then have any other person go in partnership with you? Did anybody else come into partnership with you, in the restaurant? [151]

A. At that same time?

Q. Yes. After this man got out.

A. Well, this—yeah, I got my cousin.

Q. Your cousin. What was his name?

A. John Orb.

(Testimony of John Barcott.)

Q. Orbed. And did you sell a half interest to him?      A. Huh?

Mr. Pomeroy: What's his name?

Q. What's his name?      A. John Orb.

Q. John Orbed      A. Yeah.

Mr. Pomeroy: How do you spell it?

Q. O-r-b-e-d?

A. Yeah. O-r-b.

Q. O-r-b?      A. Yeah.

Q. Orb. And did you sell half interest to him?

A. Yeah, I take him the partnership.

Q. How much he pay you for the half interest.

A. He no pay nothing in the start.

Q. How long did you stay in partnership with him?      A. He was with me six years.

Q. That mean up to 1926? [152]

A. '26. That's right.

Q. And during the first four months that you stayed with the first partner, did you two make any profit?      A. Well, we made.

Q. How much profit did you make?

A. I made hundred dollar—couple a hundred dollars a month.

Q. Couple hundred dollars a month?

A. Yeah.

Q. Were both of you working in the restaurant then?      A. Yes.

Q. And then when you got into partnership with Mr. Orb, did you make any profit?

A. Yes, sir.

(Testimony of John Barcott.)

Q. What would be the profit that you made from that period?

A. We both we was doing cooking, and we make about two fifty to three hundred dollars fifty.

Q. Each, or both of you? A. Each.

Q. Were both of you working in the restaurant?

A. Yes.

Q. What hours did you work?

A. I worked—I was working nights; he was working daytime for a while.

Q. How many hours a day? [153]

A. Well, about ten hours a day.

Q. And the restaurant is open night and day?

A. Well, they was open to late at night, yeah, two, three o'clock in the morning.

Q. And was Mrs. Barcott came into the restaurant? A. Yes.

Q. When did you and her got together?

A. She started to work 1920.

Q. '20. That's the time when you and her got together? A. Wha—we was——

Q. Was she your wife before that?

A. Huh?

Q. Was she——

A. Yeah, we was living together.

Q. And that was the time that she come to the restaurant? A. Yeah.

Q. And what did she do in the restaurant?

A. She was a waiter.

Q. A waiter on what, on the table or on the counter?

A. Table—well, yeah, tables and counter.

(Testimony of John Barcott.)

Q. And did the partnership pay her a salary?

A. Yes——

Q. Or wage, for her work?

A. She was drawing twenty-five dollars a day.

Q. A day, or——

A. I mean, shift—I mean twenty-five dollars a week, pardon me. I'm sorry.

Q. And that was coming out of the partnership?

A. Yes.

Q. It was paid to her.                   A. Yes, sir.

Q. Now when you and Mrs. Barcott got married, did she have any money?           A. Yes, sir.

Q. How much money did she have?

A. She got close to six thousand dollar.

Q. And what did she do with the money?

A. She was keep it for a while, then after while when we got the box she give it to me.

Q. And where did you put it?

A. I put 'em in the box, saving box.

Q. And where do you put your money?

A. My money?

Q. Yeah.

A. When we got the box, we was put 'em in the box; but before I was keeping cash in my home.

Q. You didn't trust the bank? Is that it?

A. No, sir. [155]

Q. Did you——

The Court: You better show the date when they were married, whether it was before or after——

Mr. Gagliardi: I big your pardon, Your Honor.



(Testimony of John Barcott.)

The Court: You better show the date when they were married, whether it was before or after.

Q. What—were you married before 1920, or after 1920?

A. No, around 1920—twenty—I think '21, something like that.

Q. And before you got married, was she working in the restaurant?

A. She was working in the restaurant.

Q. And you got married between 1920 or 1921?

A. Yeah.

Q. And how long did she stay working in the restaurant?

A. How long you mean——

Q. How many years did she work there?

A. How many years?

Q. Yeah.

A. She worked from 1920 to 1938.

Q. Now after 1926, did she receive any more wage, or salary? After you had parted with your partner?

A. No, she never received a salary. [156]

Q. What did you do with the profit that you made, if any?

Mr. Pomeroy: Just a moment. What was the answer to the—what year did you say?

Mr. Gagliardi: 1926, after the partnership dissolved.

Q. After you and your partner dissolved, and you purchased your cousin out, then your wife worked there just the same? A. Yes.

(Testimony of John Barcott.)

Q. Did she receive any wage?

A. No that time.

Q. And what did you do with the profit of the restaurant, if any?

A. We keep it together.

Q. Keep it together. Where did you put it?

A. Put 'em in my saving and saving deposit box.

Q. Did you have a safe hole in your restaurant?

A. Yes, yes, all the time.

Q. Did you at any time use bank account for putting your saving in? A. Yes.

Q. What did you use the bank for?

A. Well there's no bank goes—simply the Tacoma Savings, Loan and Saving, I got something saving there. [157]

Q. How much did you put in there?

A. That was, I think, around twenty-five hundred dollar, something like that.

Q. Twenty-five hundred dollars?

A. Yeah, or more, I don't know——

Q. What year was that, you put it in?

A. Well, it was—I can't tell you sure.

Q. Was it before the depression or after?

A. Oh, before the—oh, yes. Quite a bit before.

Q. Way before the depression.

A. Way before. yeah.

Q. And what did you do with the money that you made in the restaurant?

A. I keep the cash.

Q. Where did you put it?

A. Put it in the saving box.

(Testimony of John Barcott.)

Q. In the safe deposit box?

A. Safe deposit box, and my safe, part of it.

Q. And during the time that you was running the restaurant, what was your job there, what were you doing?

A. First, I was a cook for years there.

Q. How long—after your partner got out?

A. I was—yeah, after partner got out, I was cookin' to 1932 or '33. [158]

Q. '32 or '33.

A. No, but I was cookin', I was taking care of the cooks.

Q. Were cooking. How many hours a day did you work?

A. I was workin'—I come in five o'clock in the morning to about four or five in the afternoon.

Q. And then somebody else took the shift in the afternoon?

A. In afternoon and rest of the night.

Q. And what was your wife doing at that time?

A. She was working nights.

Q. She was working there nights?

A. Yeah.

Q. And how many hours did she put in, in the restaurant?

A. She put in long hours, I know that.

Q. Well, what do you mean, long hours, ten, twelve—

A. That was nine, ten hours, depend how's a busy, you know. If it was a busy, she was there all the time, but no less than nine hours—I mean, original, and more if it was needed.

(Testimony of John Barcott.)

Q. And more if you need it. A. Yeah.

Q. And who else was working in the restaurant after 1928? A. You mean——

Q. Just a minute. I withdraw that question. Do you and Mrs. Barcott have any children? [159]

A. Yes.

Q. How many? A. Three.

Q. What are they, boys or girls?

A. Two boys and one girl.

Q. Two boys and a girl. Now, who was the first one born, the boy or the girl?

A. There is one that came here from back in Europe, 1925. That's my boy.

Q. That's your own boy?

A. My own boy, yeah.

Q. That was not the son of Mrs. Barcott.

A. No.

Q. And what's his name?

A. Anton Barcott.

Q. Anton? A. Uh-huh.

Q. And how old was he when he came here in 1925? A. Twelve years old.

Q. How much?

A. Twelve—twelve years old.

Q. Twelve years old. And he got here in 1925?

A. Yes.

Q. And what did he do after he got here? [160]

A. And he was a goin' to school for a couple of years. About a year or two, something like that.

Q. And then——

A. And between that time he wasn't going to school, he was down at place too, you know.

(Testimony of John Barcott.)

Q. Well, what time would he come to the place?

A. Well, after the school, for a couple of years, he was washing dishes there.

Q. Washing dishes after school hours?

A. Yeah.

Q. And after he quit school, what did he do?

A. Then was washing dishes, working there, something like that.

Q. You mean, he come to work in the restaurant?

A. Huh?

Q. You mean to say he came to work in the restaurant?

A. In the restaurant. A regular steady job.

Q. And did you pay him any wage?

A. Not till he get married.

Q. And how many of your family were working in the restaurant all these years? How many of you?

A. There was three steady there, for years.

Q. And what was your profit, or your income, during those years, per month, an average—not less than a certain [161] amount and no more than a certain amount. What was it?

A. Average was running from three hundred—two fifty or three hundred to four hundred dollar, depending hows season's business is.

Q. Well, you say that you never made less than two hundred and fifty—

A. Two hundred fifty dollar, never less.

Q. That is, the three of you never made that much—less than that? : A. Yeah.

(Testimony of John Barcott.)

Q. You didn't pay your son any salary or wage, I understand?      A. No.

Q. You didn't pay your wife anything?

A. No.

Q. Was there any other children working in the the restaurant?

A. There was a youngster, but he was there four or five years—John.

Q. John.      A. John.

Q. How old is John?

A. Oh, the John is a twenty-three right now.

Q. Twenty-three.      A. Yeah.

Q. And he been working there too for many years? [162]

A. Well, let's see, he was there, start to work, he went to school—when he finished the first school, he didn't a want to go to school any more.

Q. Yeah.      A. So I'm put him to work.

Q. Put him to work where? In the restaurant?

A. I can't—yeah, in the restaurant, that's right, in our place.

Q. And did you pay him any wage?

A. No, sir.

Q. Is that the custom of your country?

A. That's the custom—he was in my family—I don't know, somebody else might, but in my family.

Q. And then what did you do with the profit that you made in those years?      A. I save it.

Q. And where do you put it?

A. Put it—some of it in the saving box. and some of it in my safe.

(Testimony of John Barcott.)

Q. Kept it in cash?           A. Cash.

Q. Who paid the running expenses of your family, that is, the house expenses?

A. My wife.

Q. And where did she get the money? [163]

A. She get the money on the tip.

Q. Tip?           A. Tip. Yeah, that's right.

Q. And did you get anything from the restaurant in the way of food, that you fed your family with?

A. Yes, I used to take care—take food from restaurant, take it home.

Q. What food would you take home?

A. Meat, all kinds of—you know, can stuff, anything they needed.

Q. You take it home?           A. Yes, sir.

Q. And Mrs. Barcott paid all of the home expenses out of her tips?

A. From her tips—payment of the house, everything that's supposed to come in on the home, that belonged to home.

Q. The net earnings of the business, then, was all put away?           A. Yes, sir.

Q. Now, what kind of a house have you got? How big is it?

A. It's about kitchen, one bedroom downstairs, and a front room, and two little bedroom upstairs.

Q. How much did you pay—when did you buy the house?           A. 1926. [164]

Q. How much did you pay for it?

A. Thirty-one hundred dollars. Thirty-one, something like that, yeah.



(Testimony of John Barcott.)

Q. Did you make any improvement on the house since then?

A. I make some of improvement.

Q. What improvement did you make?

A. I made an improvement, little bit on the inside, I turned the kitchen a little bigger, and on outside the—those what's the name—

Q. Bricks?

A. Bricks—covered with bricks.

Q. Covered with imitation bricks?

A. Yeah. That's it.

Q. How much did you spend on improvement of the house, all told, since 1926?

A. Well the most be around three thousand dollars or more—I can't tell you sure how much. I can't tell you.

Q. In improvement?

A. An improvement, yeah.

Q. How much the whole house cost you?

A. You mean altogether, improvement and everything?

Q. Yeah.

A. Well, I pay for house, thirty-one hundred dollars, and there's the improvement about six—six thousand, two, [165] three hundred dollars.

Q. How much of furniture you got in the house? How much? What's the furniture?

A. Well, what is the furniture worth? I ain't got no first-class furnish—I can't tell you sure, Mrs. Barcott was take care of it, that part.

(Testimony of John Barcott.)

Q. She purchased the furniture for the house?

A. Absolutely.

Q. Now, do you have any automobile at any time, all these years? A. No, sir.

Q. Do you smoke? A. No, sir.

Q. Do you drink? A. No, sir.

Q. Do you gamble? A. Absolutely no.

Q. Do you—what do you do for diversion, if anything?

A. I was working, like a slave, that's what I was.

Q. And that's your diversion?

A. That's all. That's only kick out of it, I was there to do the work. All those years.

Q. You don't have an automobile now, do you?

A. No, sir.

Q. Did your wife buy any expensive clothes, or did you buy [166] her any?

A. No, sir, she——

Q. How often would you buy a suit of clothes yourself? A. Myself?

Q. Yeah, how often?

A. My suit of clothes for me four, five, six years.

Q. How old is that suit you got now?

A. It is about six years old, before the war.

Q. What other clothes do you wear besides this suit?

A. A uniform I was wearing most of the time—uniform down there, white coat and white apron, I was—and pants, I was working every day, every day in the year, all those years.

(Testimony of John Barcott.)

Q. And what—do you know what would be the expenses of running your home? Do you have any idea?

A. I got no idea; Mrs. Barcott was take care of it.

Q. Now, in 1940, did you have any knowledge how much money you had put aside?

A. I got a pretty good money, I know that that I got pretty good money, but I can't tell you, figure how much it was.

Q. Well, how much, more——

A. I can't tell you—I can't tell you sure how much was there.

Q. How much did you have on January 1st, 1943, do you have [167] any idea?

A. I—I tell you, I got no idea really how much money I was a saving on that cash.

Q. All of your earning and profit went into the safe deposit box?

A. Yeah, and I was keeping a safe and a safe deposit box.

Q. Did you buy any war bond or Government bond prior to 1942?      A. Before 1942?

Q. Yeah.      A. I bought in 1937 some bonds.

Q. What kind of a bond were they?

A. They was a baby bond, you call it, I think.

Q. And where did you put them?

A. I put them—ah, saving box.

Q. And did you buy any bond in 1942?

A. I believe I—I don't know sure, I think I did?

(Testimony of John Barcott.)

Q. Where did you get the money to buy the bond? A. I got that cash money.

Q. From where?

A. From my own box and sa—and I got the cash.

Q. Now, then in 1943, you begin to buy more bond. Did you buy more bond at that time?

A. Yes.

Q. What was the inducement when you was buying these bond? [168]

A. Well, it's a—when the Government started to holler for bond, you know, you want to buy a bond, it was in the paper, so I went down there—my boy he was in the service, and it was my duty to do those things, to go get and buy bonds, and I did it.

Q. And where did you get the money to buy the bond? A. I get them from the box.

Q. From the safe deposit box?

A. Safe deposit box.

Q. And did you have any money left in the safe deposit box after you bought your quota of the bond? A. Yes, sir.

Q. Now then you bought some bond in 1945—'44.

A. Yes.

Q. Was that again upon the Government making appeal to purchase war bond?

A. Yes, sir, yes.

Q. And where did you get the money to buy these bond? A. Out of the saving box.

Q. Out of the safe box? A. Yeah.

(Testimony of John Barcott.)

Q. And did you put the profit, or earning that you made from your business, in the safe deposit box——

A. Yeah, I did.

Q. ——right along? [169]

A. I did.

Q. And did you buy these bond when the new issue were out?

A. Well, and about that time, you know, called for, every time they calls, or—I always feel like I want to do it.

Q. And did you then buy some war bond in 1945?

A. Yes, sir.

Q. And do you have any idea the amount of bond that you bought?

A. Well, I can't tell you that, I think—I don't know how much worth, but it was—I can't tell you sure how much I bought in 1945.

Q. All told, how much did you buy between '44, '43, '42, and '45? How much bond did you buy, if you know?

A. I think sixty, seventy thousand dollars, something like that, I don't know.

Q. Do you have—what schooling did you have, if any?

A. I got three year in the school by the old country.

Q. Three years in a school?

A. That's all I was.

Q. Where, in the old country?

A. Yeah, private school.

Q. And are you writing and reading pretty well, or——

A. I read pretty fair.

(Testimony of John Barcott.)

Q. How about writing? [170]

A. My writing fair, nothing extra, but fair.

Q. And do you keep any book of your assets, what you purchase, the date when you purchased these bond, or when you sell them? A. Nah.

Q. Where did you put the bonds?

A. I put the bond in the box.

Q. Where did you buy these bonds?

A. I buy it from the National Bank of Tacoma.

Q. And when you wanted to buy the bond, did you bring the money to the bank—— A. Yes.

Q. ——to purchase them? A. Yes.

Q. Did they give you the bond right away, or did they—— A. No, no.

Q. How did they wait before they give you the bond?

A. Well, sometime three, four, five days, or six, I don't know sure.

Q. You knew at that time that the Government was keeping copy of all your obligation then?

A. I think so, yeah.

Q. Some of your bond were "G" bonds?

A. Yes.

Q. And that was because you couldn't buy any more "E" bond, [171] is that it?

A. Well, that what it is, I think. That—a fellow, he told me, he says, "You better buy G bonds, instead of buy another bond, that's the best."

Q. And the "G" bond are registered in your name, and your interest is sent to you by the Government—— A. Yes.

(Testimony of John Barcott.)

Q. —right along? A. Yes.

Q. You knew at that time, didn't you, Mr. Barcott, that all the bond that you were purchasing would be registered at Washington, the Treasury Department—

A. I said—I think so.

Q. And you knew that your name and address was given to the Government?

A. Absolutely.

Q. Did you purchase these bond with money that you had prior to the time that you purchased them, or did you purchase the bond with the money that you was earning during that period of time?

A. No, I purchased that bond before that—with my money I got before.

Q. You mean—

A. And sometimes money that was made—some money on that time. [172]

Q. And did you have any more money left, after you purchased the bond, in the safe? A. Yes.

Q. And that is true through all of these years, 1943, '44, and '45? Is that true?

A. That's true.

Q. You purchased these bond. Did you make a income tax returns to the Government for these years? A. Yes.

Q. Did you report your true income. by those years? A. Yes.

Q. Prior to 1943, who was preparing your income tax reports? A. And on—'43, you mean?

Q. Before that year.

A. Oh, Tom Ray.



(Testimony of John Barcott.)

Q. Tom Ray. Who was he?

A. He was attorney.

Q. He was a lawyer. Where is he now?

A. He's dead.

Q. And after 1943, who prepared your report?

A. I was prepare them myself.

Q. What do you mean, prepare yourself?

A. I mean, count and figure myself, and then I went down [173] to International Revenue to prepare my income tax.

Q. Internal Revenue.

A. Yeah, Internal Revenue, pardon me.

Q. Not International. He tried to get that for nothing, so— And where did you get the figures, what sources? A. From the books.

Q. From the books. What kind of a book did you keep? It isn't the only book that—

A. That's one of the books here.

The Court: Pass it to the bailiff.

Mr. Gagliardi: Pardon me, your Honor. I still think I am in Superior Court. I forget the rule. I apologize to your Honor for forgetting it.

Q. Now, looking at Defendant—

Mr. Gagliardi: Let's mark it first, so we have— identification A, that will go A-1.

The Clerk: Defendant's Exhibit A-1, for identification.

Q. Is that—will you tell the Court and jury, what is that? What is it?

A. That's my business book.

(Testimony of John Barcott.)

Q. For what year?

A. From 19—July 19—July 19—let's see, I can't see, I [174] will get my glass here. July 1928. Yeah, July 1928.

The Court: To what other date? July 1928 to what other date?

Q. To what other date? What year does that book stop? A. 1943—'43.

Q. '43? A. Yeah.

Q. What date the books starts?

A. This one?

Q. This book, yes. A. 1943. July 28th.

Q. July 28th, 1943. A. Yeah.

Q. That's the date——

A. That's the date on this book, yeah.

The Court: That's when it began.

Q. That's when it began?

A. Began this book, yeah.

The Court: And when does it end?

Q. And when it ends, what date? What's the last date? A. It end February 1946.

Q. February 1946. A. '46.

Q. And do you have another book since 1946?

A. No, sir, not me.

Q. Who has the business since then?

A. My son.

Q. Your son took it over. A. Yeah.

Mr. Gagliardi: Let's see that exhibit now, and——

Q. Prior to July 28, 1943—— A. Uh-huh.

(Testimony of John Barcott.)

Q. ———did you have another book.

A. I gotta the same kind of a book a that one there.

Q. And who had that book? A. Tom Ray.

Q. Tom Ray. And what did he do with that book, if you know?

A. Well, I can't tell you, you see, he gotta sick, I can't tell you what's a happen on that book.

Q. Did you try to find the book?

A. I tried to find the book.

Q. Now, when did Mr. Ray get sick?

A. Well, I can't tell you sure, that was the Fourth of July, before I started this book there.

Q. And where did he go?

A. He went to hospital.

Q. He went to the hospital. Did he come out of the [176] hospital?

A. He come out of the hospital, I think, around the July, July, because he was went to hospital a little before the July, but I know he come out on July, I don't know what time in July.

Q. Did you ask Mr. Ray to give you the figure in the books up to the date? A. Yes, yes.

Q. Did he give you the amount which was made during the—— A. First six months?

Q. ———first six months? A. Yes.

Q. And what did you do with the amount that he give you, how did he——

A. He give me a slip.

(Testimony of John Barcott.)

Q. He give you——

A. He always cared for my books, you know, and do the figuring, and the report such as security and all that stuff, he was doing that.

Q. He was taking care of your book?

A. Taking care of absolutely my business from 1928 to 19—on that time.

Q. And he was fixing what other report, you said Social Security? [177]

A. Social Security, employment, state industry, and all that stuff he was taking care of.

Q. And those are to be made every few months, those reports?

A. Every month, that book goes to him every month, and every three—you know, every month for the state industry to figure how much labor and everything else.

Q. You had to pay industrial insurance?

A. Yes.

Q. Based on the amount of labor that you had?

A. Yes.

Q. You had to pay social security based on the amount of business that you had——

A. He was taking care of everything himself that way.

Q. And unemployment compensation?

A. Yes.

Q. And Mr. Ray was taking care of that?

A. Yeah, at that time.

Q. That's the reason why he had the books?

A. Yeah.

(Testimony of John Barcott.)

Q. And then, did you ask Mr. Ray to give the total amount of income that you had up to July 28th, 1943?

A. No, I asked Mr. Ray to give me total amount of business I take in, 1943, for the six month. [178]

Q. And did he give it to you?

A. He give me that, he bring me one day a piece—a slip of paper.

Q. Well, what did you do with the slip of paper?

A. I keep it over there on my desk.

Q. And then in 1943, did Mr. Ray—or, 1944, what happened to Mr. Ray?

The Court: It is now time for the morning intermission, Mr. Gagliardi. The jury will pass to the jury room with the bailiff.

(Recess.)

Q. Mr. Barcott, before we proceed with the examination of the books, I'll ask you some other questions concerning sources of income that you received during this twenty-six years—twenty-five years. Did your wife receive any money from any sources during the time between 1920 and 1943?

A. Yeah, she got—her mother was—she gotta killed.

Q. Yes, how much did she get for the death of her mother? [179]

A. I think she—the judgment was thirty-seven hundred dollars—she got twenty-seven hundred dollars for it.

(Testimony of John Barcott.)

Q. And the judgment was rendered against the person who caused the death?

A. Yeah. That Kerr, he was in a wreck, her and my daughter and my—her mother, that's the whole business.

Q. Your wife, your mother-in-law, and your daughter, were all in the same wreck?

A. Yeah.

Q. And your wife got twenty-seven hundred dollars?

A. Yeah.

Q. For her injury and for the death of her mother?

A. Yeah.

Q. What did she do with that money?

A. She give it to me.

Q. Where did you put it?

A. I put it in the safe.

Q. Who was the attorney that prosecuted the action?

A. There was a Charlie Dennis, and a Tom Ray.

Q. Tom Ray and Mr. Dennis. Well, Mr. Dennis knew about this income to you. He's the one who paid the money?

A. He should—yeah, he should.

Q. Now, did you purchase any interest in any boat during the year 1920 or 1930? [180]

A. Yeah.

Q. What boat was it?

A. What—the name was "The Ranger."

Q. "The Ranger." A. Yeah.

Q. And what interest did you purchase?

A. I put a five thousand—four or five hundred dollars of cash on it.

(Testimony of John Barcott.)

Q. In the boat? A. Yeah.

Q. Did you derive any profit out of the boat?

A. Well, first couple of years we did.

Q. And—first couple of years you did. Did you derive any profit after those years?

A. Yes, after that too.

Q. How much profit did you derive from the boat?

A. About seven, eight, nine—I can't tell you sure—seven, eight, nine, thousand dollars it was supposed to be.

Q. And what did you do with the money that you got from the boat?

A. I put it in the saving—safe deposit box.

Q. And did you sell your interest in the boat afterwards? A. Yes.

Q. How long did you keep that interest in the boat? [181]

A. That was from 1929 to 1936.

Q. And then did you sell your interest?

A. Yes.

Q. How much did you get from your interest?

A. I gotta thirty-five to thirty-six hundred dollars, I can't tell you sure.

Q. Did you sustain any loss in the selling of your interest, from what it cost you?

A. Well, let's—yes, on that, my part, we lost that.

Q. Now, in 1940, I believe you say you didn't have knowledge of the exact amount of money that you had in that safe deposit box, or bond, is that true? A. Yeah, that's—



(Testimony of John Barcott.)

Q. Did you in 1942—we come to 1942, do you have approximate knowledge how much you must have had in that box? A. From 1940, it's—

Q. I mean to say the beginning of 1942, did you have any approximate amount which you more or less had in the safe deposit box?

A. I believe it was around more—around more than sixty thousand dollars, I can't tell you sure.

Q. Around more than sixty thousand dollars.

A. Yeah.

Q. You didn't keep an accurate account how much you put in [182] the safe? A. No.

Q. How do you do? How do you put the money in the safe? How did you put—

A. Well, I say, is that box down there is very—you know, was very big; then, I would keep 'in the safe.

Q. Yes? A. Yeah.

Q. How did you put it in the safe deposit box, in small bills or large bills?

A. It's got all kinds—yeah, all kinds of bills, but mostly large ones those days, they was.

Q. Mostly large ones?

A. Large—all kinds—

Q. How did you acquire the large one?

A. Well, through the business, my—

Q. Well, did you acquire in large amount, or did you acquire small amount and then you went out to the bank and got larger amount?

A. No, well let's see, lots of times people come in there and cash me, and fifty dollars bill or hundred dollars bill, or something like that, then I'll save that.

(Testimony of John Barcott.)

Q. And did you purchase any larger amount such as a thousand dollar bill? [183]

A. Yes, that—1945, I did.

Q. Why did you purchase those large amount?

A. Well, it's my brother-in-law come in here in Tacoma, that he wanted build a boat?

Q. Yes?

A. So he says he want around ten to fifteen thousand dollars, and then I went—instead of keep a small bill to carry himself, and I went and buy those one thousand dollars a bill.

Q. You got the small denomination bill and went to the bank and got the larger amount?

A. Yeah.

Q. Where did you buy it? A. What——

Q. Where did you get it, what bank?

A. Well, part of it at Puget Sound Bank, and part of it someplace else.

Q. In the National Bank? How much of these thousands dollar bill did you acquire?

A. About twenty thousand.

Q. About twenty thousand. Where did you get the money to buy those bills?

A. It was from my box.

Q. From your box. At the time you bought the bills, did [184] the bank ask you your name and address, didn't they? Didn't they ask you who you was and your address?

A. No that time, he knows me, I don't think so. They knows me down—you know.

Q. They didn't ask you the name? A. No.

(Testimony of John Barcott.)

Q. And in purchasing this one-thousand-dollar bill, was for the purpose of loaning to your brother-in-law?

A. Brother-in-law to build a boat, yeah.

Q. Were you going to acquire an interest in the boat?

A. Me?

Q. Yeah.

A. I got no idea to acquire an interest——

Q. You had no idea of purchasing an interest?

A. No.

Mr. Pomeroy: Just a second, if the Court please, I'll object, he's leading——

The Court: You are asking leading questions too much, Mr. Gagliardi. This witness is a defendant in the case, and the Court will allow you a reasonable degree of liberality, but you must refrain from leading questions as much as possible. [185]

Q. Now, Mr. Barcott, what become of the book which you had prior to July 1943?

A. Why, I can't get you there, what you say——

Q. What become of the book which you had prior to July, 1943?

A. Well, I told you that it was the book that was on that office over there?

Q. Whose office? A. Tom Ray.

Q. And what become of Tom Ray?

A. He's dead.

Q. Did you make a diligent effort to get the book?

A. What do you mean, a——

Q. You tried to get the book back, didn't you?

A. Oh yes, absolutely, I tried to.

(Testimony of John Barcott.)

Q. And you couldn't find either Mr. Ray?

A. No, he was already gone, you know, after that.

Q. Then in July, 1943 you started a new book?

A. Yes.

Q. Showing you Defendant Exhibit for identification A-1, I ask you if that is the book that you started in July, 1943?           A. Yes.

Q. And that book shows the income and the expenses of your business? [186]           A. Yes.

Q. What language is it written in?

A. It's part of Slavonian there.

Q. Will you explain to the Court and the jury what you mean by these word in the beginning of each page, where you say "Ri" and then "L-i-s-t-o." What do they represent?           A. You mean——

Q. "Ri," what that represent?

A. Ri, that mean gross, gross.

Q. You mean receipts?           A. Receipts, yeah.

Q. From what sources? What source did you have this receipt?

A. Receipts, what sources, from, yeah——

Q. Where did you get it?

A. From the cash.

Q. From the cash from where?

A. From the register.

Q. And where was the register?

A. Register was in the front, in the Oyster House.

Q. You mean——

(Testimony of John Barcott.)

Mr. Gagliardi: Your Honor, I don't want to lead the witness, but you see, Your Honor, it is quite hard for him to speak the English language and understand my question. Sometime—

The Court: Proceed.

Q. Now what business was it, what is the name of the business you got?

A. California Oyster House.

Q. Huh? A. California Oyster House.

Q. And this was the receipt from your business? A. Yes sir.

Q. Now, what is meaning of the word L-i-s-t-o?

A. You mean the first, first those things? Come on, give me the—help me out. I can't tell what it is when you spell it.

Q. What part of the book is the income reported, the gross income?

A. You mean gross business—

Q. Yeah. Gross business done, yeah.

A. That's the part I call "Ri," that's the one where how much we take the cash in.

Q. Cash in, all right. Now, what's the other side? A. How much we pay out.

Q. And paid out for what? [188]

A. For grocery, butchers, and everything else, what we supposed to pay, you know—come in.

Q. And what they represent at the bottom of each page? A. Here? Labor.

Q. Labor. Do you have the name of the employee that you have in the restaurant?

A. That's the labor here, yeah, that's each line here.

(Testimony of John Barcott.)

Q. Does that represent the amount paid to each? Each employee? A. Yes, sir.

Q. Is the receipt in each case marked in the same way? A. Yes.

Q. The income and the expenses?

A. Yes, sir.

Q. What expenses represent on the place where you have listed as L-i-s-t-o, as Listo?

A. I mean gross.

Q. Gross what? A. Business I take in.

Q. And what you call the expenses, what is the word in the book that is called—refers to——

A. Expenses is the second one.

Q. The second one. That's at the top of the page.

A. Yeah, that's what I told you, I says the butcher and the [189] grocery men, part of it, and the milkman and a couple other.

Q. Does that represent all of the expenses that you had in the restaurant?

A. No, I got something else besides, some little books there was.

Q. Well, what other expenses did you have?

A. Huh?

Q. What other expenses——

A. I gotta gas, lights. and stuff like that, monthly. No daily.

Q. Rent? A. Rent.

Q. How did you pay those expenses?

A. I pay by the check.

Q. And where did you draw the checks? What bank?

A. From National Bank of Washington.

(Testimony of John Barcott.)

Q. And what did you put—where did you get the money to put in the bank to pay for those checks? A. I get it from the business, cash.

Q. And how much money did you put in the bank each month? For what purpose did you put it in?

A. Well, to pay the part of the butcher, part of the catsup, and stuff like that. [190]

Q. You mean those bills that you pay by checks?

A. Yeah.

Q. And you say you have another little book that represents what you paid by checks?

A. By check or cash, such as dishes, and stuff like that; some of the catsup sent from Seattle, and part of the laundry, something like that, you know.

Q. Laundry—you mean those bills which you ordinarily pay monthly?

A. Monthly, yeah.

Q. And those which are marked there, how were they paid, by check or cash?

A. This one here?

Q. Yes.

A. The butcher paid by check.

Q. The butcher, but I mean those which are marked here in the book, in the book which you have now in your possession, which is marked Exhibit A-1 for identification.

A. Uh-huh.

Q. What expenses do they represent? Do they represent checks or cash?

A. They represent—see, there's a butcher come in with a slip of fifty dollars the butcher today



(Testimony of John Barcott.)

there, then all [191] week, then after the week I put right here every day how much which have come in, bring it down.

The Court: What account was that? Did you pay the butcher in cash or did you pay him by check?

The Witness: Oh, I pay the butcher by the check.

Q. All of the expenses marked here on your—on that book paid by checks?

A. On this one here?

Q. Yes.

A. No, by the check, that's the thing—that's the everything I know, I no pay by the check, I pay by the cash.

Q. That's the thing that I am trying to get.

A. Well, well, that's it.

Q. In that book then, is marked all of the bills that you paid by cash?      A. Cash.

Q. And in the other little book then, is what you paid by check?      A. Check, yeah.

Q. Mr. Barcott, is there any expenses charged there in that book which was paid by check, in the book which you have in your hands, which is Exhibit A-1? [192]

A. I explained it, yeah, the butcher, I told you that——

Q. The butcher.      A. Yeah.

Q. I see.

A. The butcher and some of the fishermen there was paid by the check, too.

(Testimony of John Barcott.)

The Clerk: Defendant's Exhibit A-2 for identification.

Q. And where did you mark the payment of the checks? Did you mark it in any other book what you paid by checks?

A. Yes, that one there.

Q. Showing you Defendant Exhibit A-2 for identification, is that the book that represent payment of bills by check?

A. By the check, by the monthly, yeah.

Q. By the month. A. Yeah.

Q. Did you have any other book in your business? A. No.

Q. That's the total amount of your books?

A. Yeah, that's all.

Q. Did you put down all of the money that you received out of your business in this Exhibit A-1 for identification? A. Put down what? [193]

Q. The amount which you received every day, that you got out of the business.

A. Yes, sure.

Q. And did you mark all of the expenses that you received in Exhibit A-1 as well as Exhibit A-2 for identification? A. Yes.

Q. The two together represent all the expenses that you sustained? A. Yes.

Q. Did you receive any greater amount than what is marked in the book A-1 for identification?

A. Well, let's see, for——

Q. Any more than what you marked there?

A. No, no sir.

(Testimony of John Barcott.)

Mr. Gagliardi: We offer the two identifications.

Mr. Pomeroy: No objections.

(Whereupon the books referred to were admitted in evidence as Defendant's Exhibits Nos. A-1 and A-2, respectively.)

Q. Now, Mr. Barcott—

The Court: I suppose, Mr. Gagliardi, when you ask him the question whether he received any more income than that, you meant from the business?

Mr. Gagliardi: From that business, your Honor, I want to limit it to that business alone.

Q. Now, did you receive—you had a contract with somebody—

Mr. Gagliardi: May I have that exhibit? I think—I don't recall the number of the exhibit. It is the contract between himself and his son.

Q. Mr. Barcott, you say you had two sons?

A. Yeah.

Q. What's their name?

A. John and Anton.

Q. John and Anton. Did—is there any of them married? A. The both are now married.

Q. Anton, when did Anton get married?

A. 1932, or '31—'32, I think, something like that.

Q. And at the time that he got married, did you buy any home for him?

A. After that, yeah, after while, I buy him a home.

(Testimony of John Barcott.)

Q. And when did you buy the home?

A. In 1933 or '34, I don't—can't tell you sure what year.

Q. Showing you Exhibit No. 9, Government Exhibit No. 9, I ask you if that is the contract that you made with your [195] son, or at least an extract of the contract that you made with your son when you bought the house for him?

A. I don't know—I no understood anything about a contract business or anything that Tom Ray was preparing. I can't tell you sure, but I think it is, I don't know sure.

Q. All right. And who prepared the contract?

A. Tom Ray.

Q. Why did you make the contract with your son? Did you buy a home for him?

A. Well, I buy a home, and the contract—I want to make him payments in advance. He spend the money, he throw away money so foolishly.

Q. You say he throw the money foolishly?

A. So I make the—made him pay the payments on it.

Q. And where did he make the payments?

A. Oh, it was down the National—Washington bank.

Q. Do you know that the contract called for the payment of interest?

A. I don't know anything about it. Tom Ray was to take care of it—I no used—I never bothered with that—

(Testimony of John Barcott.)

Q. Did you intend to charge your son any interest on that contract? A. No sir. [196]

Q. And did you ever go to the bank and find it out, whether or not——

A. No, I never touched that. I never even looked at it.

Q. You didn't even look at the money?

A. No, sir, I never looked at the thing at all.

Q. Did he make the payment right along on the contract?

A. I think so, I never keep track of it.

Q. And what—when is first time that you touched the money? When was the first time that you touched it, you did take it?

A. That was about two or three months ago, a couple of months ago.

Q. What did you do with it?

A. I draw the four thousand dollars on that savings account and I put it back to his business.

Q. You gave it to your son to his business?

A. Absolutely.

Q. Who took over your business?

A. Anton Barcott.

Q. When did he take over the business?

A. I would think 1946, in February.

Q. And what did he do with the money that you took out of the bank?

A. He run my own place, pay the bills in the place and remodel, and do what he is supposed to do. [197]

(Testimony of John Barcott.)

Q. Did you have any idea at all that you were going to collect interest from your son?

A. No sir, I never even think of it.

Q. Did you receive some dividends from the Fishermen's Packing Company? A. Yes.

Q. What dividend did you receive, do you recall? Did you receive any check from the profits of those dividend?

A. They sent a check to me, yeah.

Q. Did you give this figure to the person who made the income tax return for you?

A. Yes.

Mr. Gagliardi: May we look at those reports, please, the exhibit—the income tax return.

Q. Showing you Government Exhibit No. 1, which is reported to be a photostatic copy of the income tax return that you made for the year 1943, I would like to call your direct attention to item number two which say "dividends," and I ask if those are the dividends that you received from this packing house?

A. Yeah, that's what it is.

Q. Did you have any other source of income that would pay dividend? Did you have any other interest in any corporation that paid you dividends?

A. No corporation.

Q. And there is another line which says, number three, line number three, says "Interest received." Look at the amount of interest, number three, look at the report, Exhibit No. 1, number three say "Interest received." What's the amount of interest that you received there?

(Testimony of John Barcott.)

A. I can't tell you, I can't see with my glasses, you know.

Q. May I have it back?

A. Yeah. I can't read that thing.

Q. Item number three reads: "Interest on corporation bonds, bank deposits, notes, and other—and so forth, \$184.00." Where did you receive this interest from? Who paid you the interest? What sources?

A. On—interest in the bank, the bank.

Q. Interest from the bank? A. Yeah.

Q. Did you receive any interest on the Government bonds? A. Yes, that's right.

Q. And did you put it in the return when you made your income tax return? A. Yes.

Q. Now we come to 1944, Exhibit No. 2, Government Exhibit No. 2, in which item number three—you say you can't [199] read this fine print?

A. No, I can't do it.

Mr. Gagliardi: May I be permitted to read it, your Honor?

Q. Item number three says this: "Enter here the total amount of your dividends and interest, including interest from Government bond obligations, unless wholly exempt from taxation." You entered the total amount of \$698.50. Was that the amount that you received for that year?

A. Yes.

Q. Is that the amount you gave to the girl who was making your income tax return?

A. Yes.



(Testimony of John Barcott.)

Q. Did you receive any greater amount than that to your knowledge?

A. Not that I know.

Q. Now come to Government—Plaintiff's Exhibit No. 3, which is the return of income tax for the year 1945. Item number three says this: "Enter here total amount of your dividends and interest, including interest from Government obligations, unless wholly exempt from taxation." You entered there fourteen hundred dollars.

A. That's right. [200]

Q. And what did that represent, what interest?

A. Dividends and interest from the bonds.

Q. Dividend and interest on the bond.

A. Yeah.

Q. Did you receive any more than that?

A. Not that I know.

Q. That is the maximum amount that you received?

A. Yeah, that's what it was supposed to be.

Mr. Gagliardi: Give me that exhibit termed the contract. Is the contract there? No, some other contract, with the Fishermen Corporation. May I look at the exhibit, your Honor? I just want to look at the exhibit.

Q. Did you purchase any interest in the Fishermen—Fishers Packing Corporation? You testified that you purchased, you got some dividend from that corporation.

A. Yes.

Q. How many shares did you purchase?

A. That was, I think, fourteen hundred shares there was in the Fishermen's Packing Company.

(Testimony of John Barcott.)

Q. You mean fourteen shares or fourteen hundred dollars?

A. Fourteen hundred dollars, yeah, that's right.

Q. How much you pay on it? How much you pay for them?

A. A hundred dollars a share. [201]

Q. Hundred dollars a share. And how many shares did you receive?

A. That was fourteen hundred shares there was after it was settled with the company.

Q. Did you have agreed to purchase more than fourteen hundred shares?

A. Yes, before it was more.

Q. How much did you agree to purchase?

A. That was around eighteen—eighteen shares.

Q. And that was at the time when the corporation was formed?

A. Corporation was started, yeah, well the time, between the time when it was started, yeah.

Q. And how was the money to be paid?

A. Pay out of the profit of the corporation.

Q. That was the agreement you had with the corporation?

A. Yes, but I paid—I paid cash on the start, I put some money on that.

Q. And then what become of the other four shares?

A. Four shares, the company was, you know, they no made any money and we made a settlement for the amount. I was owe some money to the company.

(Testimony of John Barcott.)

Q. Yeah.

A. And we made a settlement with the manger that cleared up all that thing and make the fourteen hundred share the [202] full amount what's it worth.

Q. You mean fourteen shares.

A. Fourteen shares, yeah, fourteen, that's right, pardon me.

Q. And there was an agreement between you and the corporation?           A. Yes.

Q. Did you sell the shares prior to January 1, 1946, or do you still have it?

A. This year, yeah.

Q. Fourteen share.

A. Yeah, I sell it. Sold some shares.

Q. This year? I mean, before the first of January, 1946.

A. That was last—sometime last year. I don't know——

Q. All right, last year.           A. Yeah.

Q. During 1945 you had——

A. Yeah, something, I don't know. I——

Q. Now, have you accounted for all the sources, all the money that you received from the California Oyster House, and the interest that you received?

A. Yes.

Q. Now, do you recall sometime in February 1946—or, January 1946, receiving a telephone call from some [203] sources?           A. Yes.

Q. What did you learn when you went back to the restaurant, California Oyster House.

A. They left a telephone number there.

(Testimony of John Barcott.)

Q. Telephone number? A. Yeah.

Q. And did you call that number?

A. Yes.

Q. And who answered the 'phone? Did they tell you who it was?

A. They told me it was somebody by the name of Mr. Swanson and Nielsen, he says they wanted to see something about the revenues.

Q. About Internal Revenue? A. Yeah.

Q. And where did they tell you to go?

A. He told me, he says, "You're supposed to come here on seventeenth building." He didn't say seventeenth building; he said seventeenth floor.

Q. On what floor?

A. Seventeenth floor in Puget Sound Bank Building.

Q. The seventeenth floor of Puget Sound Bank Building. A. Yes. [204]

Q. And did you go there? A. Yes.

Q. Did you go there right away, or did you wait any length of time?

A. No, I went right away after he called me up.

Q. And did you—where did you go? Where?

A. In the Puget Sound Bank Building.

Q. On the seventeenth floor? A. Yes.

Q. Who did you find there?

A. I find there Mr. Nielsen and Mr. Swanson.

Q. And what were they doing, standing up or sitting down?

A. Both, they stayed there.

(Testimony of John Barcott.)

Q. And what did Mr. Swanson do?

A. Mr. Swanson was—he was ready to go out.

Q. And what did he do?

A. And Mr. Nielsen told me, he says, “Sit down, John, sit down,” he says, and Mr. Swanson went out.

Q. And then what did Mr. Nielsen say to you?

A. Mr. Nielsen says to me, he says, “What are you doing with those thousand dollars of bills?”

Q. And what did you say to him?

A. I says, “I got ’em.”

Q. And what else did he say? [205]

A. He says, “Where’s that thousand dollars bill?” I said, “Down in the box.”

Q. And what else did he say? Did he say what you do with bills, did he?

A. He says, “How about we can, do want to bring that money here or you gonna go down there see that?” I says, I says, “All right, we can go down there to see.” And I got my working clothes on and I figure out in my pocket and I says, “I got no key.”

Q. You didn’t have the key. A. Yeah.

Q. All right.

A. I says, “All right, I’ll go ahead and get the key and I wait down there in the bank for you,” I says, I mean we gonna go down in the box.

Q. All right, what did you do then?

A. And then I come down—get out from the building, I think of it——

(Testimony of John Barcott.)

Q. Where did you go?

A. I went to Oyster House.

Q. Yes?           A. Yeah, and I——

Q. For what purpose did you go there?

A. My purpose was to get the key. [206]

Q. All right.

A. But I think when I get out that my money is in the Oyster House.

Q. You think that your money was in the Oyster House?

A. Yeah, that one thousand dollars bill.

Q. And where were they?

A. They was in the safe in the Oyster House.

Q. In the safe in your Oyster House?

A. Yeah.

Q. And what did you do then?

A. Then I take it. It was in—an envelope, and I take it and put it in my pocket.

Q. And did you get the key for the safe deposit box?           A. Yes.

Q. And what did you do when you got the—did you go back?

A. I went back down to the bank.

Q. And what did you do when you went down to the bank?

A. I was waiting for him and pretty soon he come in.

Q. Who come in?           A. Mr. Nielsen.

Q. And where did you two go to?

A. I went down to the bank and signed my name, and went opened up the box, but before we went down there, Mr. Nielsen, he says to me, he

(Testimony of John Barcott.)

says, "John," he says, [207] "You don't have to go to the box." I told him, I says, "Never mind, we can go, that's all right."

Q. He says, "You don't have to go to——"

A. Yeah.

Q. "——unless you want to." A. Yeah.

Q. Did he say, "You don't have to show to me anything"?

A. Well, that's what he, you know, he say it that way.

Q. And what did you say to him?

A. I says, "Never mind," I says, "All right, I gonna show you," I says, "everything I got."

Q. All right. Did you go to the box?

A. Yes.

Q. And did you open the box? A. Yes.

Q. What did you take out of the box? What—  
did you take the little box out of the safe?

A. Out of the National Bank safe and I went down in the little room.

Q. And did they have a little room, in those places? A. Yes, yes.

Q. And who was in the little room?

A. There was myself first, and then Mr. Nielsen come in [208] right close to me, see.

Q. And what did you say to Mr. Nielsen, what did you do?

A. I says, "Here's your—," I says, "Here's your box, here's your—" then I pull out my twenty thousand dollars in my pocket and I even look. I says, "Here's your one-thousand-dollars bill."



(Testimony of John Barcott.)

Q. And where did you put it?

A. I put it right in that box.

Q. And what did Mr. Nielsen say, if anything?

A. He don't say anything.

Q. Now then, did he count what was in the box?

A. Then after a while he said, "Now," and he started to count that money.

Q. And how much money did you have?

A. I got twenty thousand dollars.

Q. Did you tell Mr. Nielsen that you had only ten thousand dollars?

A. I was a—I was a telling him that ten thousand, but I says I might as well show him all the whole darn thing I got.

Q. And did you have twenty thousand?

A. Yeah, I got twenty thousand.

Q. And you knew that you brought twenty thousand when you went? [209]

A. Yes sir, I know.

Q. And you had the twenty thousand dollars in your own safe in the restaurant?

A. Yes sir.

Q. You got it out of the safe?

A. Yes sir.

Q. And you went down to the safe deposit box with Mr. Nielsen then?

A. Yeah.

Q. And that's the twenty thousand that you showed to him?

A. Yeah.

Q. And did he count it?

A. Yeah, he sat down there and he started to count it.

Q. Well, did—did he tell you that there was twenty thousand instead of ten?

A. Huh?

(Testimony of John Barcott.)

Q. Did he tell you that there were twenty thousand instead of——

A. No, he told me the twenty thousand when he counted it, you know.

Q. And what did you say?

A. I says, "All right, that's fine," I says.

Q. What else did you say? Did you know there were twenty thousand? [210]

A. Yeah, I know there was the twenty thousand dollars there.

Q. And did you offer to pay Mr. Nielsen some money to make a favorable report?

A. No sir, I never did no such——

Q. Did you know what a favorable report mean?

A. I didn't know anything about it, a report or anything.

Q. What did you say to him concerning the thousands of dollars?

A. I say, "Here's your one-thousand-dollars bills you was looking for." I showed him that box and that's what I told him.

Q. And did you then offer to buy his wife a fur coat and——

A. I never tell him anything, no sir.

Q. Did you know Mr. Nielsen?

A. I didn't know him; first time I see him that time.

Q. Did you know whether or not he was married?

A. I don't know he was a married or single, I don't know anything about him.

(Testimony of John Barcott.)

Q. And did you offer to buy his wife a fur coat and him a suit of clothes, if he make a favorable report? A. I never offered him nothing.

Q. Now, after he counted the money, did he put it back into the safe?

A. Yeah, I put it back in the same in the box.

Q. And——

A. He count the money, he count the bonds, and everything in it.

Q. Did you have any other cash in the safe deposit box?

A. There was three thousand dollars of small bills.

Q. And then what did you do after your—counted the money, did you put the box back into its place?

A. Well, he count the bonds too, you know. He was there for a while, there he count the bond, and I got my son-in-law bonds there, and I got my lodge, my Slavonian-American Lodge bond, he check up all those things.

Q. You had your son-in-law's bond and——

A. Bond, and Slavonian-American Benevolent Society bond was there, there was one of my friend's bond there, he counts all those in there.

Q. Did you have any bonds which you had purchased in 1936? A. Huh?

Q. Did you have any bonds in there which were purchased either in 1936 or '37? Baby bonds. Government bonds.

A. Oh '37, yeah, they was there.

(Testimony of John Barcott.)

Q. Where were those bonds?

A. They was there in that box?

Q. And he counted it all? [212]

A. Yeah, he counted all them that——

Q. And then what did you do?

A. Well we,—when he finished the count—it took him quite a little bit of time, and then when he finished the count we went out.

Q. And where did you put—do with the box?

A. I simply closed the box, put them in box, put them back where they belong.

Q. And where did you go?

A. Then I went down there in my place.

Q. When did you next hear from either Mr. Swanson or Mr. Nielsen?

A. The next time.

Q. When was the next time?

A. When I see 'em, I don't know, I think four, five, six days, or later, or ten, I can't tell you sure, the date.

Q. And they came over to see you, or telephoned you? A. They called me up on the 'phone.

Q. And what did they say to you?

A. Now, he says, "We want you to do down the box, we want to check your box again."

Q. Where did they tell you to go?

A. Down to the Washington Bank.

Q. All right, what did you do? [213]

A. I went down there.

(Testimony of John Barcott.)

Q. Did you go to their office first, or did you go right to the bank?

A. No, I—direct to the bank. They was waiting for me in the bank, both of them.

Q. Both of them. And did you go down to the box again? A. Yes.

Q. Did they say anything to you concerning you don't have to show them the box?

A. Never said a word.

Q. Didn't say a word then. And did you go back to the box?

A. What do you mean?

Q. In the safe deposit box.

A. Yes, the same thing, we do the same thing. They was there, both of them, and we went same that room, and they sit down and they check up again.

Q. And did you at any time endeavor to conceal anything from them?

A. What——

Q. To hide anything away from them?

A. No, absolutely no, everything I got I just a show them right there. I never think that I do anything wrong.

Q. You knew that they were going to accuse you of not [214] paying income tax at that time?

A. No sir, I was sure that I was absolutely honest and everything. I paid the full amount and everything.

Q. And did they ever say anything concerning you about income tax?

A. They never mentioned anything to me.

(Testimony of John Barcott.)

Q. The only thing they mentioned was money?

A. Money, well there was—yeah.

Q. Did you then voluntarily, or otherwise, did they ask you if you had any other box?

A. Yes, afterward, yeah.

Q. And what did you say to them?

A. I says, "Yes, I got a Washington—" I mean, "Washington Building."

Q. In the Washington Building?

A. Yeah.

Q. Did you give the number of the box?

A. No, he come in with me.

Q. And what did they say, they want to see this other box?

A. Yes. Both come in with me.

Q. What did you have in this box?

A. I got bunch of insurance, and paper, all kinds of paper.

Q. You mean house abstract—

A. Well, insurance paper, somebody else paper, and all [215] kinds of stuff there.

Q. And how long did you have that box in the Washington Building?

A. Oh, maybe three, four, five year, I think.

Q. And how long you have the box in the National Bank of Washington?      A. Since 1922.

Q. Since 1922. And what did you keep in the box in the National Bank of Washington?

A. I keep the money, bond, everything was there.

(Testimony of John Barcott.)

Q. And where did you keep your insurance and your abstract and your deed?

A. In that box over there, yeah, down below.

Q. Why did you keep two separate box? Why?

A. Well it's,—well, I can't help it, I got so many things there. I got plenty of that stuff there and I can't keep it in the one box.

Q. You mean, they would not go in, in the National Bank of Washington?

A. Well, after while there was a big one, but before—you know, there was a kind of a size box, but they can't go in there. There was a bunch of us was keeping, before I bothered, down there downstairs there in the Washington Building, in that box, we was keep a bunch of insurance [216] in my place.

Q. And——

A. You see you know why I was a scared because we got a fire once in 1938 there too, you know.

Q. You mean you was scared your insurance would burn up.

A. Yeah.

The Court: It is now twelve o'clock, Mr. Gagliardi. We will take an intermission until two o'clock this afternoon.

(Recess.) [217]

2:00 o'Clock P.M.

The Court: Now if there is nothing further, we will proceed with the case we have. You may proceed, Mr. Gagliardi.



(Testimony of John Barcott.)

Mr. Gagliardi: If the Court please, Your Honor, the defendant has an additional instruction and request the Court to give to the jury.

JOHN E. BARCOTT

resumed the stand for further examination, and was examined and testified as follows:

Direct Examination

By Mr. Gagliardi:

Q. Mr. Barcott, I believe we left this morning concerning the safe deposit box that you have in the Washington Building. Do you recall when did you rent that box?

A. Oh, about four or five years ago.

Q. And what was the purpose, or what was the occasion of renting that box?

A. Well, I got a bunch of policies, and paper, paper lease and stuff like that.

Q. And was there any space to—in the box in the Washington [218] Building to put it in—I mean the National Bank of Washington safe deposit box. Was there any space to put them in there at that time?

A. What do you mean, I can't get you there.

Q. You had another box in the National Bank of Washington? A. Yes.

Q. How long did you have that box?

A. Since 1920—'22.

(Testimony of John E. Barcott.)

Q. Is it the same box you got now, or was there a larger or smaller box—

A. Large one. Large one now.

Q. It's larger now?           A. Larger now.

Q. And was it smaller before?

A. Before, yeah.

Q. Now, when you rented this box from the Washington Building, what did you put in, and what did you hold in there up to this time?

A. Well, I told you. I told you a while ago, I says all them insurance policy, business policy, and—well, the insurance business policy and papers, we had all kinds of papers there.

Q. Did you hold any paper belonging to anybody else?

A. Yeah, some of it belonged to Slavonian-American Benevolent [219] Society there, and all that kind of a stuff.

Q. And what position do you hold in that society?

A. I was the Treasurer there in that.

Q. And did you have the will of any other people?

A. Yeah, I got will of some other lady next door to us.

Q. Did you keep any money or bond in this box in the—           A. No sir.

Q. Where did you keep them?

A. I keep it down in the Washington National Bank.

(Testimony of John E. Barcott.)

Q. Now there is here introduced in evidence—showing you Plaintiff Exhibit No. 10, and I ask you if you recognize what those two slips are?

A. Yeah.

Q. What are they?

A. That's for the box in the Washington Building.

Q. There are two of them on that exhibit; one is what date?

A. One is—let's see, one is, it's nothing to me—ten, I don't know, I can't read very—

Q. After you left the National Bank of Washington on January 28, 1946, that is the date when you had first conversation with Mr. Nielsen, did you go to the safe deposit box in the Washington Building? A. I did.

Q. What was the purpose of your going there?

A. I got a couple of policies with me in my pocket, and I went over there, on the way I put it into it.

Q. And at the time you went in, you signed a slip you were going in? A. Yes.

Q. And those safe deposit box were in your name? A. Yes.

Q. And this Exhibit No. 10 bears your signature? A. Yes.

Q. How often would you go to this box?

A. Oh, no very often, I don't know, sometime it take a long time to go over there. I've got nothing very much to do in that box.

(Testimony of John E. Barcott.)

Q. And you knew that every time you went in you had to sign a slip? A. Yes.

Q. And you knew also that every time you went in they marked the time in which you was in?

A. Oh, I don't know, I think it the truth though.

Q. And the same was true with the National Bank of Washington? A. Yes.

Q. Did you go there again after January 28?

A. What box?

Q. In the Washington Safe Deposit box, which is in the [221] Washington Building?

A. Well, I think so, I don't know sure, but I think so I did.

Q. Did you keep record whenever you went into those box and whenever you went out?

A. No.

Q. Did you go to the box when you had to go there, you didn't keep any date? A. No.

Q. Now, the next time you went to that box that was with Mr. Neilsen and Mr. Swanson?

A. Yeah, that was while—yeah.

Q. That was February 13th?

A. I think so.

Q. And at that time did you open the box for them? A. Yes.

Q. Who told them that you had this other box?

A. I did.

Q. And did you go to that box and you opened the box? A. Yes.

(Testimony of John E. Barcott.)

Q. Was the box contain the same contents it always contain?

A. That's the same thing, same like it was before, all the time.

Q. Did you take anything out of it between those two dates? [222]

A. No sir.

Q. Did you at any time keep any money or bond in that box?

A. No sir.

Q. Where did you keep all your money and bond?

A. I keep it down in the Washington Bank.

Q. When you purchased—hired this box in the Washington Building, was the National Bank of Washington box large enough to contain all your stuff in there?

The Court: I think that is repetition, Mr. Gagliardi.

Mr. Gagliardi: Oh, I beg your pardon, your Honor.

The Court: Proceed.

Q. Did you at any time, either before or after you talked to Mr. Nielsen, take anything out of the safe deposit box in the Washington Building? Any money or bonds? Did you have any there?

A. No, no, no, I got no anything that way there.

Q. Now——

Mr. Gagliardi: Will you give me the other exhibit, those deeds, will you? The deeds, the photo-static copy of the deeds. [223]

(Testimony of John E. Barcott.)

Q. Plaintiff Exhibit No. 16 is a photostatic copy of a deed given to you by H. J. Gielens in November 30, 1943. Did you purchase that property?

A. I bought the property for a fella, you know, he was ready to get kicked out of a house, and he come—he lives close to me over there.

Q. Yes.

A. And he come in to me and he says, "John," he says, "I gonna have to get out from the house." He's got a sick wife.

Q. Yes.

A. She was pretty sick woman, and he says, "I have to get out if you can't help me out on a little money, some money to buy that property." He says, "those people they want to sell that." I says, "Bob," I says, "all right," I says, "I do it."

Q. And how much money did you give him?

A. About seven hundred fifty dollars.

Q. And was you buying the property for yourself, or it was for Mr. Gielen?

A. No, I was buying it for him, you know.

Q. And then Government Exhibit No. 17 is a deed from you to Robert B. Knego.

A. Knego, yeah, that's—— [224]

Q. Who is Knego?

A. He's one of my neighbors, a couple of blocks from me.

Q. A couple of blocks to you.                      A. Yeah.

Q. Was he the man who you lend the money to?

A. Yeah, that's the man I pay for.

(Testimony of John E. Barcott.)

Q. Was he purchasing the property from Gielens?

A. Yeah, he made—he went down there and fix it up, I give him money, he put the mortgage on me.

Q. He put a mortgage in your name?

A. Yeah.

Q. And did you at any time consider that property was yours?

A. I never—you know, I used to call on there to pay me out.

Q. And Government Exhibit No. 17 is a deed from Knego, from you to Knego and his wife?

A. Yeah.

Q. Is that the deed you gave back to Mr. Knego for the property that your purchased?

A. Yeah.

Q. Did you recall anything about it when you was talking to the agent that you had a title to this property?

A. No, I never pay any attention to 'em, you know. I never [225] really never got anything out of those things.

Q. It was merely loaning so far as you was concerned?

A. I would loan till he pay me. He pay me in a short time, too, you know. He was pay me off so much in a short time. He was working for Government through the war time.

Q. Now——



(Testimony of John E. Barcott.)

Mr. Gagliardi: Give me Exhibit No. 1 of the Defendant, I put——

Q. Showing you Government — Plaintiff — Defendant Exhibit A-1, and that is the book that you kept for the income and expenditure of your business, the California Oyster House.

A. Yes, sir.

Q. Did you give that book to Mr. Swanson to audit it? A. Yes.

Q. Did he have it in his possession all the time?

A. Yes.

Q. And did you give also the little book which is marked Exhibit No. 2?

A. There was no first time that I give you that book on that one there. After while, I think, I don't know when it was.

Q. Did you give it to him after while? [226]

A. Yeah, I thinks it was, I give it to him, I give it to my attorney, you know, he was take care of all the time.

Q. Who was your attorney?

A. Anthony Ursich.

Q. Anthony Ursich. And did you at any time try to conceal anything from the Government agent?

A. No, sir.

Q. Now, Mr. Barcott, during the time that your wife was working in the restaurant, did you know that she was receiving tips from the customers, and making money? A. I don't know.

Q. Did you make any report for that money?

A. No.

(Testimony of John E. Barcott.)

Q. Why?

A. I didn't—we didn't know that we was supposed to pay the income on that tip.

Q. There was no one ever suggested?

A. Yeah, we was figure that the gift.

Q. That's a gift?           A. Yeah.

Q. And you never reported those as income tax return?           A. No.

Q. And did any time, any of the agent of the Government, when you went to the Government to make the return for [227] your income tax, suggested that tips was income that should be reported?

A. Never mention nobody to me, nothing.

Q. Did your attorney, Mr. Ray, at any time, think——

A. Never, I never hear of such a thing, no.

Q. Did Mr. Ray know at that time that your wife was working in the restaurant getting tips?

A. He knows.

Q. Did he ever suggest it to you that you should include it in your income tax?

A. Never, never.

Q. And did you sincerely and honestly believe that was not reportable as income?

A. Absolutely. I never—I never heard of such a thing——

Q. Did you believe it was not taxable income?

A. That's what I be—that's what I understand.

Q. If you understand otherwise, would you have reported it?           A. Yes, sir.

Mr. Gagliardi: You may cross-examine. [228]

(Testimony of John E. Barcott.)

Cross-Examination

By Mr. Pomeroy:

Q. Mr. Barcott, how long were you treasurer for the Yugo-Slav—Slavonian Benevolent Association?

A. About twenty years.

Q. Did you keep the books of that organization?

A. No, I no keep the books.

Q. What were—what were your duties as treasurer?

A. Treasurer, to put money in the bank and to keep the file. I got a box, they save it, and they give me file all that deal that we got in the Slavonia, all of it.

Q. And you—and you kept account of what money you had from the Slavonian Benevolent Association? A. Yes.

Q. You never had any trouble over that account, did you? A. What do you mean?

Q. Well, you were never questioned by the Slavonian Benevolent Association about your keeping the books for them, were you?

A. No, they got a bookkeeper, they got a regular secretary to keep the books.

Q. Uh-hum, but you kept the money?

A. The secretary deliver the money to my restaurant down [229] there, then I put 'em in the bank, that's all I had to do it.

Q. And you kept track of what money you had for them all the time, didn't you?

(Testimony of John E. Barcott.)

A. No, our secretary—we got a different system. Our secretary report all that money we got on that lodge there. I got nothing to do with those things except to put the money in the bank.

Q. Except that you had to give it back to them when they wanted it.

A. Well, the secretary sign the check, and I had to sign the check too, myself. And nothing go without check.

Q. When was the last time that you had any of their money?

A. Oh, about a couple of months ago.

Q. Was there any of the money that was in this box that was looked at——

A. No, none in the box, no.

Q. Where did you keep that money?

A. I keep the money in my place.

Q. In the safe?           A. In the safe.

Q. And all the money that you kept in your place in the safe, belonged to the Slavonian Benevolent Society, is that right? [230]

A. No, he come in once a month.

Q. Once a month.

A. Once a month a little money today, and tomorrow I putta there in the bank.

Q. How much—how much money do you have for them——

A. Oh, they no run a very high. They run about—ah, it would reach a couple a hundred dollars a month.

(Testimony of John E. Barcott.)

Q. During the war you had various drives, didn't you, to raise money for Slavonian War Benefits for Yugoslavia? A. Who me?

Q. Well, the Slavonian Benefit Society—Association.

A. Ah, that's got nothing to do with that. This is a separate local, down in Old Tacoma.

Q. Down in Old Tacoma.

A. That used to be a branch there.

Q. Did you ever donate any money from your own funds to the War Relief for Yugoslavia during the war?

A. Let's see, I don't know, I think so.

Q. You think you did?

A. I think so, I donate a hundred dollars or something like that, I don't know, I can't tell you——

Q. When did you do that?

A. That was in Seattle outfit over there. That's all relief to the—— [231]

Q. Yeah, how many times did you donate to that cause? A. I can't tell you.

Q. How much money did you give to the Yugoslav War Relief?

A. I can't tell you. There's a fellow who was supposed to—to care of it, he says it was not taxable, any money to give it to them.

Q. How much money did you give to them?

A. It was no very much, I don't know how much, but it was no very much.

(Testimony of John E. Barcott.)

Q. Well, make the best estimate you can.

A. A couple a hundred dollar, I think so, I don't know sure right now——

Q. Well, was it one hundred, two hundred, three hundred?

A. Couple a hundred dollars, I think. That's what I remember, I was no—never pay any attention to it.

Q. You don't know?           A. No.

Q. That was an appeal also, wasn't it, just as much as the United States appealing for the war bonds?

A. No, this was a relief. That was not bonds; that was relief for something, I don't know, I can't understand. They just come around and ask me for, I give it to him. He says this is not taxable for you.

Q. You don't know how much you gave him?

A. Well, I—really, a couple a hundred dollars, I think, I don't know sure.

Mr. Gagliardi: I am objecting, Your Honor, that is incompetent, irrelevant and immaterial, pursuing this subject farther now.

The Court: Objection overruled.

Q. What efforts did you make to get this other book of account that you say Mr. Ray had?

A. What do you mean, efforts? I can't——

Q. What did you in order to try and recover this book that you say now, Mr. Ray had when he died?           A. Uh-huh.

(Testimony of John E. Barcott.)

Q. What did you do about that?

A. I tried to find out. I found out after the Government go after me, and I found out where is the book. He was keep all those files for me, and everything as that.

Q. Where did you go?

A. I go to Mr. Ursich, and Mr. Ursich called up for it.

Q. You went to Mr. Ursich, is that right?

A. Yeah.

Q. When did you do that?

A. Oh, that was after the Government come in there and ask me for it. [233]

Q. Well, do you mean to say that in 1946 was the first time you looked for that book that you say you lost in 1943?

A. I no need a that book at all. That was in my file and Mr. Rays got everything, social security, employment compensation, everything else it was in his office.

Q. Well, didn't you say on this stand that you started this book in July, 1943, because you couldn't get the other book from Mr. Ray?

A. Well, he was a sick, that's the reason I can't get it.

Q. And so you didn't ask anybody for it, but you started a new book?

A. I started a new book, yes.

Q. But you never asked anybody for the other book.

A. Well, I never paid attention to it, no, as long as I got that book, that was all right.



(Testimony of John E. Barcott.)

Q. In other words, you didn't look for the other book at all. You just started a new book——

A. Oh, I no look. I know this, that that book was in his possession, and so I no was looking for.

Q. So it wasn't until 1946 that you went to look for the other book, is that correct?

A. Yeah, that's right.

Q. And you asked your attorney to——Mr. Ursich to—— [234] A. Yeah.

Q. ——find that book for you? A. Yeah.

Q. What did he do in order to find it, do you know?

A. Huh? He called up some place over there, I don't know where——

Q. Were you there when he called up?

A. No, I no was there. I told him, I says, "What's a happened to 'em?"

Q. You don't know what happened after, you just told Mr. Ursich that you lost it—you told him that in 1946?

A. I was——when I check up, you know, when the Government they want my—to see my book and check me up and I went—try to go through that file and I got right there—see, the Mr. Ray was ready—the second time he was a pretty sick, he bring all that bunch of file on my place. And he was there, I was always figure he did all my business.

Q. Well, then, do you want to tell this Court and this jury now then, that you started this book but

(Testimony of John E. Barcott.)

you didn't ask Mr. Ray or anybody for the old book, is that right?

A. I no ask him for no books.

Q. You didn't ask Mr. Ray or anybody for the old book, until you asked Mr. Ursich in 1946? [235]

A. Well, the only thing I asked Mr. Ray, that was around September, you know—I mean September, October, he do the figure. He was keep a book, I know he—there was a file in his office. He was figure he was going to do the job for me again, so that's the reason I keep those books there——

Q. Well, let's get this straight, Mr.——

Mr. Pomeroy: May I have Defendant's Exhibit A? A-1?

Q. As I understand it, this book was started, Defendant's Exhibit A-1 was started July 28, 1943, is that correct? A. Yeah, that's right.

Q. And at that time you think that Mr. Ray had your other book, is that right?

A. Mr. Ray was—was—he gotta sick.

Q. Where is the book—where is the book that preceded this one, the book ahead of this one?

A. On that one there, it was in Mr. Ray office, and he asked me for, he says, "What's the idea of this, Ray?" Then Mr. Ray asked me for, I says——

Q. Just a moment please. Answer my question. Do you know where the other book is that precedes this book, that is ahead of this book? [236]

A. That was in Mr. Ray office all the time.

Q. Do you know where it is now?

A. I don't know where it is.

(Testimony of John E. Barcott.)

Q. Do you know where it was on July 28th, 1943?

A. I know it was in Mr. Ray office.

Q. Why didn't you get it in—on July 28th, 1943, instead of starting this new book?

A. Well, I can't get into, he was in hospital.

Q. All right. When did you again ask him for it?

A. That was—that was quite a bit later, maybe a month or—when he come back from the hospital, I ask him for it.

Q. Oh, you did?           A. Yeah.

Q. All right. What did he say?

A. He says, "All right, John, here's your book, and I fill 'em up this social security, you can't work, and the more——"

Q. What did he do with the book? Did he give it to you?

A. I bring it down; I fill 'em up those thing, then I told him again, I says, "Mr. Ray," I says, "I want you come in, getta my book——"

Q. What did you do with the book?

Mr. Gagliardi: I suggest that counsel [237] allow the witness to answer the question now, Your Honor.

Mr. Pomeroy: That's what I'm trying to get, a responsive answer.

Mr. Gagliardi: Well, I think interrupting will——

(Testimony of John E. Barcott.)

Q. Did you give the book back to Mr. Ray again?

A. Yeah, I did, and you know he had to figure how much we take in for six months on that.

Q. And then what—when did you go to get it again?

A. Never, I never, he just leave 'em—he leave 'em there in the file with the rest of the things.

Q. He left it in the file? A. Yeah.

Q. And then you never paid any more attention until——

A. I never—I never bother, I no need to. I never bothered.

Q. Was that book all filled up?

A. Which one?

Q. The one that you left with Mr. Ray?

A. Well, I can't—it was there before, then he was get sick and I can't get into it.

Q. Was the book that you left with Mr. Ray, filled up to the last page?

A. It was—I think it was a part of it, but——

Q. Did you have to start this book because the other book was filled up?

A. No, I had to start this book on account of Mr. Ray was sick. I can't get into the office, I don't know what his file is.

Q. Have you had any fires in your place of business? A. 1938.

Q. When else? Any other time?

A. There was July, I think, July 15, for about two weeks, July 15 we had a little fire.

(Testimony of John E. Barcott.)

Q. July what?

A. July—between July 15th or something like that, but I——

Q. What year?

A. 194—'43, I think.

Q. July, 1943, you had a fire in your place?

A. I think the books show there that we was closed for a couple of weeks.

Q. Well, what book, do you mean this book?

A. I think that one there, I think so.

Mr. Pomeroy: Will you hand this book to him and have him tell us when it was that they had that fire?

A. There it is right here.

Q. What date? [239]

A. That was July '43—July 19—July 18, it was, closed there.

Q. July 18th, 1943?

A. 18, yeah. And two week we was closed there.

Q. Your statement is that you've made money all the time that you've been in the California Oyster House, is that correct?

A. Yes, sir.

Q. And that you saved all that money because your—you and your family have lived on the tips that your wife received working as a waitress in the California Oyster House. Is that what you want this jury to believe?

A. Well, she take care of the expenses at home on tips.

(Testimony of John E. Barcott.)

Q. Well, that's what your family lived on. And you saved all your money that you've earned.

A. And food I would take from the place home.

Q. And food that you took from the place home.

A. Yeah.

Q. Otherwise, all the expenses were paid by your wife's tips? A. Yes, sir.

Q. And how much—how much a month did you earn during that period of time?

A. Myself? [240]

Q. Well, how much did you receive from the California Oyster House, the operations of it?

A. That was running from two-fifty to three hundred-fifty, four hundred dollars.

Q. Every month?

A. Every month, clear money.

Q. And you made money all the time?

A. Absolutely, else would I be there.

Mr. Pomeroy: Will you mark this, please?

The Clerk: Plaintiff's Exhibit No. 18, for identification.

Q. You are being handed what is marked for identification as Plaintiff's Exhibit No. 18. Does your signature appear on that? Is your name on that? Did you sign that any place? You may look through it.

A. It's a name here, John Barcott.

Q. Did you sign it? A. Yes.

Q. And what—what is that instrument?

A. That's income tax report.

Q. For what year? A. 1940.

(Testimony of John E. Barcott.)

Q. And you say—did you make money that year, or lose money that year? [241]

A. 1940 we remodel the place.

Q. Did you make money or lose money that year?

A. Well, that year we was a losing money, but that was—we was remodel place.

Q. You didn't make any money that year?

A. No, that year, no.

Q. You reported a loss, didn't you?

A. Yeah, account of the—account of the repairing, remodel. That was Tom Ray take care of, I got nothing to do with those things—I don't know, I turned everything over to his hands.

Q. And you charged yourself off with a hundred dollars of the food that you ate for the year, is that right?

A. I eat down the place.

Q. A hundred dollars for—

A. Well, that means I eat the meals, my meals, when I'm working down there.

Q. That's all you ate, was a hundred dollars worth for the year?

A. That's all, just one meal a day and sometime just breakfast, that's all. The rest of the meal I eat at home.

Q. You say the only reason that you show a net loss here is because of the alterations of the place?

A. Yeah, I think so, that's up—it was up to him, everything. I don't know nothing about those things.



(Testimony of John E. Barcott.)

Q. Well, you know that you remodeled the place, don't you?

A. Yeah, I know we remodel, we spend the money for the place.

Q. And how much did it cost you to remodel it?

A. I can't remember that really.

Q. What did you do with the slips or ticket off—tape off of your cash register?

A. I give it to him to check up how much money we spend on the place.

Q. You gave your cash register tape to—what did you do with that when you—

A. Oh, no, I no say about the cash, I say about what we spend on the place to remodel.

Q. What did you do with the cash register tape?

A. I throw it away, I think.

Q. You throw it away? A. Yeah.

Q. What did you do with the purchase slips when you bought something?

A. Well, never keep it.

Q. You just destroy those too?

A. Well, when the fifteen days or month is over, I no [243] bother with them at all.

Mr. Pomeroy: I'll offer Exhibit 18.

Q. Did you tell the Court and the jury—

Mr. Pomeroy: Oh, pardon me, until you pass on the exhibit.

Mr. Gagliardi: No objection.

The Court: It may be admitted in evidence.

(Testimony of John E. Barcott.)

(Whereupon the income tax return of John Barcott for the year 1940, was admitted in evidence as Plaintiff's Exhibit No. 18.)

Q. Did you tell the Court and the jury that you didn't have much in the way of household furnishings out at your house?

A. No, I did not.

Q. What did you tell the Court this morning about that?

Q. What do you mean, which way you want?

Q. You say—do you know anything about the household furnishing at your house?

A. Yeah.

Q. Well, who bought those?

A. Mrs. Barcott takes care of it.

Q. Did she pay for everything you have in the house?

A. She pay—yeah, she pay that. [244]

Q. What kind of a refrigerator do you have out there? A. We got Philco refrigerator.

Q. When did you buy that?

A. Well, about 1938 or something like that.

Q. About 1938? How much—

A. I can't tell you sure what year.

Q. How much did you pay for that?

A. I don't know, she was—she knows that, something—what it cost.

Q. You don't know how much.

A. She went buy that stuff.

Q. And she bought it out of her tips?

A. Yes sir.

(Testimony of John E. Barcott.)

Q. What kind of a stove do you have out there?

A. I got a electric stove.

Q. And when did you buy that?

A. That was buy about the same time, that time.

Q. About the same time.

A. I don't know what year is.

Q. About 1938?

A. I don't know the year really.

Q. Well, when do you think?

A. She was working in 1938 and that time she give me, she give me everything, she take care of it to that time, [245] but I——

Q. She gave you what?

A. Money that was made out of the tip, if there was anything over, she paid all the expenses at home.

Q. How much did she give you?

A. Well, every time she was over so much, she give it to me and turn it to me.

Q. How much did she give you in 1938?

A. 1938 that was—I can't tell you. I didn't keep track of it.

Q. Besides that, she paid for the stove and the refrigerator, is that right?

A. If I bought it in 19—over—before 1938, she was take care of it; but if I bought it after that, I can't tell you sure. I think I have to take care of it then.

Q. Where did you buy it, do you know?

A. I think Overland's, music company there, someplace.

(Testimony of John E. Barcott.)

Q. Overland music company.

A. Yeah.

Q. Did you buy it, or did she buy it alone?

A. She was over there to take care of that thing.

Q. Did you go over there at all? A. Huh?

Q. Were you—— [246]

A. I went once there.

Q. You went to *took* at it before she bought it too, did you? A. Yes.

Q. Did you pay any money for that yourself?

A. No, not right away.

Q. Well, when did you? Later?

A. Oh, it was later, it was kind of a account there for a while there.

Q. Account there for a while?

A. Yeah, I think I was take care of that, I'm not sure.

Q. Did you pay for it then, on the account, or did she pay for it?

A. Oh, I was—if we bought it after '38, I was take care of it myself.

Q. In other words then, you paid for the stove, is that right, over at that electrical——

The Court: Who paid for that?

Q. You didn't—she didn't pay for that out of tips, you paid for that.

A. Well, she was no working after that, after 1938.

Q. So you paid for the stove, then?

A. Well, I believe that, I think, though out of the money.

(Testimony of John E. Barcott.)

Q. What kind of a furnace do you have out there? A. We have got no furnace. [247]

Q. No furnace at all? A. No sir.

Q. How many stoves do you have in the house?

A. There's two.

Q. Two of them.

A. What do you mean?

Q. Stoves. What kind of heat do you have in your house?

A. I got oil stove, that goes the whole days.

Q. Oil stove. A. Yeah.

Q. Is that what you have now?

A. No, I got electric stove.

Q. How many? A. Couple.

Q. Couple. A. Yeah.

Q. When did you buy the second one?

A. That was—let's see, that was two, three years ago.

Q. Who paid for that?

A. I was take care of it, I——

Q. You paid for that.

A. I was take care of that. We sold our other—remember, we sold our other stove, we take care of on that money.

Q. Uh-hunn. Who paid—who paid the telephone bill out [248] at your house—do you have a telephone? A. Yes.

Q. Did she pay for that out of her tips?

A. No, I pay now, but she used to pay before herself.

Q. She paid that out of her tips.

A. Yes.

(Testimony of John E. Barcott.)

Q. Now you pay it. A. Yes sir.

Q. How long have you paid it?

A. Since she quit working.

Q. 1938? A. Yeah.

Q. Telephone. Electric lights, who pays for those? A. I pay now.

Q. You pay now. She paid for that out of her tips before '38, is that right?

A. Yes, she give me the money, or either she did it herself.

Q. She gave you the tip money and you went and paid it?

A. Well, I was have to write a check or something like that, I paid for; if she knows, she pay it herself.

Q. Do you ever go to church, and give the church any money? A. Well, little bit.

Q. And who gave that, did you or your wife out of her tips? [249]

A. The last, the last—after '38, I do myself.

Q. After '38, then, you gave to the church?

A. Yeah.

Q. But before that, your wife gave the money out of the tips, is that right?

A. Well, let's—I don't know, we give it to 'em or no in those days. I can't tell you sure, I can't tell you how much money we give 'em before. There was no very much money a month on that.

Q. Not very much money. A. No sir.

Q. You don't know where it came from?

A. What do you mean?

(Testimony of John E. Barcott.)

Q. Well, where did the money come from, your wife's tips or from what you earned?

A. Well, before '38, if there was anything, it was—if there was anything expenditures in the house, it was her money.

Q. Was there a lot of tips during the depression years?

A. Absolutely, she was doing good—she was making good money there.

Q. She made good money out of tips during the depression, then?      A. Yes sir. [250]

Q. How are the tips now, better than during the depression years?

A. I don't know what they are, I never ask anybody anything.

Q. You never went to any shows or any entertainment of any kind?

A. Oh, once in a while I go in a show, but no nothing else. I never go no place.

Q. Did you pay that money out of your wife's tips, or did you pay it out of your own money?

A. What do you mean—why, now since she quit working, I pay my own self for it when I go to the show.

Q. Well, you're talking about twenty-four years, that's what you were telling the Court about, that for twenty-four years you've saved all your own money, and that's how you have so much money.

A. Well, that's no matter, that's all I go, you see I go to the show once——



(Testimony of John E. Barcott.)

Mr. Pomeroy: Will you please recheck this paper, and read the question directly to the witness? You may read the question to him.

(Question read.)

Q. And you and your family lived off of your wife's tips. [251] Now I am asking you whether or not you went to the shows and things like that, entertainment, that your wife paid for that out of her tips?

A. That no amount to nothing, I never go very much in the show.

Q. Well, when you did go, did that money come out of your wife's tips or not?

A. No, before—no after that—before, I never—I don't want nothing, I never ask for four bits to go to the show.

Q. You paid for that yourself then?

A. I got money in my pocket, but it no amount to nothing.

Q. When you bought a suit of clothes, did your wife pay for that out of her tips too?

A. No sir.

Q. Did you pay for that yourself?

A. I got myself once in a while a suit of clothes.

Q. When you bought a pair of shoes or a pair of socks, did your wife pay for that out of her tips?

A. No, no her, no her, no out of that.

Q. When the kids went to school and you gave them some money, did your wife pay that out of her tips?

A. When they was working, yes.

(Testimony of John E. Barcott.)

Q. When they were working. [252]

A. Yes sir.

Q. Then you paid them?

A. When she was working she did, she furnished the kids and everything supposed to be in the house.

Q. Out of her tips?           A. Out of her tip.

Q. Did you pay her any money for her wages?

A. No, never was——

Q. All she lived off was her tips?

A. Yes sir.

Q. And she supported you and the kids out of her tips?

A. Support, there's no support—support the home, pay the expenses in the home.

Q. That's what I'm talking about. She paid all those out of her tips, and you saved all your money?

A. Yes sir, I saved everything.

Q. You never bought any food outside of what you took home from the restaurant?

A. I always took from the restaurant.

Q. Never bought anything anyplace else?

A. Well, fish and meat and all that stuff all come in from the restaurant——

Q. Did you buy any food anyplace else except taking home from the restaurant? [253]

A. We buy a chicken sometime, not very often.

Q. Did she buy that out of her tips too?

A. She buy over there all the expenses home there.

(Testimony of John E. Barcott.)

Q. Did you ever buy any food for the house outside of what you took home from the restaurant?

A. Why, myself?

Q. Yes.

A. No, she was take care of that home expenses.

Q. Did you ever buy anything, food for the home, yourself?      A. After '38, I did.

Q. After '38 you did.      A. After 1938 I did.

Q. What did you buy?      A. Huh?

Q. What did you buy?

A. Sometime chicken or loaf of bread, or something like that, but no very much.

Q. I suppose you have a lawn mower out at your house, don't you?      A. Yes.

Q. Who bought that?

A. After '38 I did, little bit out of——

Q. You bought that yourself.      A. Yeah.

Q. That didn't come out of your wife's tips.

A. Not after '38.

Q. When you had Christmas presents to buy, did you buy those out of your wife's tips too?

Mr. Gagliardi: There is no evidence there was any Christmas present given, your Honor. I am objecting to the line of questioning. He has gone too far now to be proper cross-examination.

The Court: The questions have to be limited, of course, but then I shall overrule the objection.

Mr. Pomeroy: Will you read the question to me, please?

(Question read.)

A. I no buy Christmas presents, she was take care of all that business.

(Testimony of John E. Barcott.)

Q. Did she buy it out of her tips?

A. What do you mean, now?

Q. Did you give—— A. Now?

Q. Before '38.

A. I no buy Christmas presents, she was take care of all that business.

Q. When you paid for your safe deposit box, did she pay [255] for that too, out of her tips?

A. No, I pay the—I pay the—that's only is a little amount of money on the year.

Q. When you did any gambling, did she give you the money to gamble with?

A. I never gamble, I never smoke, I never go no place.

Q. You never played cards with any of your friends? A. No sir.

Q. Never at any time?

A. No sir, I was working ten or twelve hours a day, every day.

Q. Never played a little friendly game with your friends?

A. I don't know what the game is.

Q. You don't know what it is——

A. That's you're asking for, no.

Q. I'll ask you whether or not, Mr. Barcott, on or about February 13, 1946, in Mr. Harry Swanson's office, in the Internal Revenue office, with Mr. Swanson being present, Mr. Nielsen and yourself, if you didn't tell those two Revenue Agents that you occasionally played a friendly game? A game——

A. No sir, absolutely wrong, I don't know nothing about the game.

(Testimony of John E. Barcott.)

Q. Never did, never—— [256]

A. If there is any person in Tacoma see me that I played a game, well, you can hang me if you want.

Q. Well, the question I am asking you is whether or not you told these two men that statement. A. I never say that.

Q. You never——

A. They are wrong when they say that.

Q. You never said that? A. No sir.

Q. When was it that you rented this box in the Washington Building? A. What was?

Q. When did you rent that box in the basement of the Washington Building?

A. I think three, four—four or five years ago, I don't know sure what the date.

Q. Four or five years ago. A. Yeah.

Q. Didn't you testify here, it was 1943, a little while ago?

A. Three or four years, I can't tell you for sure.

Q. And what was the reason for your renting it?

A. Huh? What was the reason what?

Q. That you rented that extra box, that other box in the [257] basement of the Washington Building.

A. The fella who's took care of those boxes is our customer, and beside I need a box for, I got lots of policies, and lots of paper, and lots of lease and other stuff to keep, and that things, and I started to buy bond over there there wasn't enough room in that box over there to keep all that business. There was all that stuff in my place there.

(Testimony of John E. Barcott.)

Q. So you had—didn't have enough room in the box in the National Bank of Washington——

A. No sir, those policies and——

Q. Those policies.

A. ——the Slavonian-American Benevolent Society stuff and everything else.

Q. So then you went ahead afterwards, though, and bought all these bonds, didn't you, after you bought the new box, and put those in the first box. How did you have room for all the bonds you bought after that in the first box when you didn't have enough room back when you rented the box in the basement of the Washington Building?

A. I think—I don't understand what you mean.

Q. You bought all these bonds after—— .

A. Yes. [258]

Q. ——you rented the second box, isn't that correct?      A. Yes.

Q. And you put them in the first box, didn't you?

A. In the Washington National Bank.

Q. That's right.

A. Well, that's where they belong.

Q. But, you had room enough for all these bonds you bought in that box, didn't you?

A. Well, that, they was right there, yeah.

Q. Well, I thought you said you didn't have any room in there and that's why you had to rent the second box.

A. No, I had bigger box in 1943, '44, on that there.

(Testimony of John E. Barcott.)

Q. Uh-hum.

A. To keep those thing, but I got no room to keep the rest of the policies and stuff like that on that place, and I don't want it mixed up with that, anything with that kind of a stuff there.

Q. You don't want your insurance policies in with your bonds and money, is that what you mean?

A. No, I say, I got so damn many stuff there.

Q. You got so many that you don't want your insurance policies in with your bonds?

A. When the bonds and money was there.

Q. How was the restaurant business in 1946, as compared to [259] 1945, and '44 and '43, Mr. Barcott?

A. It was lots better.

Q. Lots better.

A. Yes.

Q. You are again being handed Defendant's Exhibits A-1, Mr. Barcott. Can you tell me what your receipts were for February 1946?

A. I ain't got know in this book, I no—I got nothing to do with that.

Q. You don't know?

A. No, my son keep the bookkeeping and keep the—he's got a bookkeeper and take care of that business.

Q. It doesn't show in that book.

A. No, except a couple months.

Q. What months does that book in here?

A. January, February.

Q. February, when?

A. February, let's see—28th, yeah.

Q. What year?

A. 1946.



(Testimony of John E. Barcott.)

Q. How much did you take in during the month of February 1946?

A. I can't figure out right now, but it's right here in this book, that's where it is. [260]

Q. Was it eight thousand, two hundred and forty-one dollars and thirty-five cents?

A. I can't tell you sure, I never—I give it to accountant to figure in this thing when I report my income tax 1946.

Q. Wasn't that the month during the two-week period when the Internal Revenue agents checked your restaurant? A. Yes.

Q. Can you now tell us how much the gross receipts were for February 1946?

A. You mean gross all those years?

Q. No, how much did you take in during the month of February 1946?

A. Month of February. I never—I never figure those things. I give to the accountant to figure how much the gross receipt, it is right here in the book, everything that was take in.

Q. The figures are shown here, is that correct?

A. That's what it is.

Q. And if those figures that you have there add up to eight thousand, two hundred and forty-one dollars and thirty-five cents, that is the correct amount of income for the month of February 1946, is that correct?

A. I think so, I give it to accountant to take care of that, [261] and I think it is all right—everything all right. I no copy all this.

(Testimony of John E. Barcott.)

Q. All right. Now I'll ask you how much you took in during the month of February 1945.

A. It's right here in this book——

Mr. Gagliardi: The book is in evidence.

A. ——I can't tell you out of my mind.

Mr. Gagliardi: If your Honor please, I am objecting that counsel is asking the witness when he has the book in evidence, and the book speaks for itself. And besides, I don't think it is fair comparison between 1946 when the ration went off.

The Court: Objection will be overruled.

Mr. Gagliardi: Note an exception.

Q. If those figures are added that you have there for the month of February 1945, is that the correct amount of income for that month?

A. 1945?

Q. Yes.           A. Everything was here.

Q. And if that figure shows the figure was six thousand, five hundred and thirteen dollars and ten cents, that would be the correct amount of income for the month of February 1945, is that right?

A. Yes sir. [262]

Q. What income did you have for the month of February 1944?           A. It's right here.

Q. Do you have it in there?           A. Yes sir.

Q. Tell us how much it is.

A. Well, I can't tell you here how much it is. I know—this is no accountant figuring it.

Q. Did you have a bookkeeper though, during that period of time?

A. No, I got no bookkeeper.

(Testimony of John E. Barcott.)

Q. Who put those figures in that book?

A. I put the figure in myself there how much we take in.

Mr. Hale: If your Honor please, counsel must be laboring under a misapprehension. This book represents the figures per week; now if he wants the witness to calculate the respective totals, we'll have to ask for some time. He can't sit there and give a month's total.

The Witness: I can't tell you anything out of this thing here and give the figure.

The Court: Well, you can very well settle that question. Is it a week instead of a month? [263]

Mr. Pomeroy: He has the total there weekly, that's correct.

The Court: Well, eighty-two plus, is that by the week or month?

Mr. Pomeroy: No, that's totaled by the month. The sixty-five hundred is totaled by the month of February, 1945.

Q. And if the figures in that book for February 14, 1944, totaled six thousand, four hundred and sixty-nine dollars and ninety-five cents, then that would be the correct amount that you took in in February 1944, is that correct?

A. There was everything here that I take in right here in this book.

Q. And it was during the month of February, 1946, that the Internal Revenue agents checked your cash register, is that right?

(Testimony of John E. Barcott.)

Q. And were the figures exactly the same as to amount of cash that you took in and the amount of figures that you had on the cash register?

A. That's the figures I take the cash out of it, thats where I get the figure out of.

Q. You made up your own packages each day on this two-week check, didn't you?

A. What? [264]

Q. You made up your own package for each daily——

A. Well, I save every day what there was take in.

Q. And actually the difference was between nothing and about fifty-seven dollars and thirty-five cents a day that you were off on your figures, isn't that right?

A. I never check all those slips.

Q. You never checked the slips.

A. I never know anything about it.

Q. You don't know whether your sales tickets and your cash register checked, or anything?

A. I never check those slips at all. I never find any money in the register. Everybody go in the register; everybody take the cash in that place.

Q. In other words, you think somebody goes in and takes some of the money out of the cash register.

A. I don't know they take no, I never did.

Q. Well, do you think somebody else did, is that why the difference?

A. I don't know what's a happen, everybody get in that register, everybody take the cash there.

(Testimony of John E. Barcott.)

Q. Everybody takes the cash?

A. Yes sir.

Q. Who do you mean by everybody?

A. Well, all the people that work for me there, cooks, the [265] waiters, and everybody else goes in that cash register.

Q. So you really don't know how much you have in that cash register, is that right?

A. Well, it's when I—the next day I count the cash, then I find how much cash I got, but I no take the cash during the week. I got no cashier.

Q. Did you check the amount of the sales slips with the number of meals——

A. No, I never did, I never done anything, I never know that there was that things there either. I never—I trust everyone.

Q. You trust everybody?

A. I trust all people who was working for me there.

Q. You trust everybody that works for you.

A. Absolutely, I let everybody go in the register, so I trust everybody.

Q. And you went in the register too, didn't you?

A. In the morning I was in the register, and I take the cash.

Q. And you went in during the day too, didn't you?

A. No sir.

Q. You never went in the register.

A. No, I never cash in anything.

(Testimony of John E. Barcott.)

Q. Mr. Barcott, how much money did you have saved in 1940? [266]

A. Oh, around—in 1940 you mean? From 1919 to 1940?

Q. How much money did you have that you had saved in 1940? A. I think——

Q. At any time in 1940. A. 1940?

Q. Yes. A. I can't tell you.

Q. Approximately.

A. No, I can't tell you that thing.

Q. Do you think you had a hundred dollars saved? A. What do you mean?

Q. Well, I'm asking you how much you had saved. A. I can't tell——

Q. You know what a hundred dollars is, don't you?

A. There was money all in a bunch there, I can't tell you how much I saved.

Q. Did you have fifty thousand dollars saved?

A. What do you mean, from what? 1940 one year?

Q. No, all together.

A. I was—maybe more than that, quite a bit more.

Q. Sixty thousand?

A. About sixty- sixty-five thousand or something like that.

Q. Well, why didn't you pay off the two hundred dollars that you owed to the Fishermen's Packers Corporation [267] and get your stock?

(Testimony of John E. Barcott.)

A. There was the company was in a bad shape at that time. I no want to—they didn't know if they were going to stay there or no. That's the reason I no pay 'em.

Q. You got—you got ten per cent on your dividends, didn't you? One year?

A. Later that, but no before.

Q. You got six per cent another year, didn't you?

A. Well, the last two or three years.

Q. You got six per cent another year, didn't you?

A. Last two three years, three four years, that's all. Before she never make any money.

Q. And you owed them money since—from 1932 to 1940, isn't that right?

A. Well, they was still in that company, I no want to pay anything on that.

Q. Well, you finally—you finally made a settlement with them whereby you let them have four shares of stock, isn't that it?

A. Yeah, I just give it up to the company was four shares. At that time the business, the fish business, no was very good on that company.

Q. Well, you didn't try to sell the rest of your stock, did you? [268]

A. Huh?

Q. You didn't try to sell the rest of your stock.

A. I was keep it.

Q. You kept it? A. I keep it, yeah.

Q. But for eight years you didn't pay off that two hundred dollars, did you?

A. I never bother with them, you know.



(Testimony of John E. Barcott.)

Q. You never bothered with them. But you owed that money all that time.

A. Well, the company was—we figure once that we gonna lose all that money on that company was in bad shape.

Q. And you're telling this jury that you had sixty or seventy thousand dollars in the bank, and you were still paying on an account on an electric stove down at the electric company, isn't that right?

Mr. Gagliardi: I your Honor please, I am objecting. Counsel's method of cross-examination is he is repeating the question over and over again. He has to answer half a dozen times.

The Court: Objection overruled.

Mr. Gagliardi: Note exception.

Q. You had sixty or seventy thousand dollars saved up, but [269] still you were paying on an account, on a time contract, on that electric stove down at the electric company, isn't that right?

A. That's right. What's the difference in that?

Q. Don't argue, please. Just answer the question.

Mr. Gagliardi: The counsel, I'm asking again, your Honor, that counsel be admonished. He argues with the witness, the witness has the right to argue back.

The Court: Let's get along——

Mr. Gagliardi: I am trying to, your Honor. I'm trying to get along the best I can.

The Court: The Court is going to run on this case, now, and direct the manner in which matters may be presented.

(Testimony of John E. Barcott.)

Mr. Gagliardi: I am appealing to the Court for the protection of this witness, which I think your Honor has to protect the witness.

The Court: The Court has ruled. Counsel will be seated.

Q. As a matter of fact, Mr. Barcott, on June the 10th of 1940, that Fishermen's Packing Corporation paid you a six per cent dividend, isn't that correct? A. I think so. [270]

Q. And you did not pay off your two hundred dollar debt to them until you settled with them by transferring stock to them in cancellation of the two hundred dollar note in 1940.

A. Well, there was a some kind of a mess in there, you know. I no was pay any attention to that stuff you know.

Q. Didn't you——

A. You see once I was ready to lose that stock all together, the fish business it was so bad.

Q. Mr. Barcott, didn't you just get through telling this Court and jury that you weren't making any money out of it; however, now you're telling them that you made six per cent in June 1940?

A. There was some kind of a settlement come in there. If the company can't explain it to you, I can't explain it to you nothing on that deal. The man from the company can't explain it to you which way were these things.

(Testimony of John E. Barcott.)

Q. Well, in June 1940——

A. I tell you, I no was pay any attention to that. They no only settle with me that way; they settle lots of stuff over there in that company, the same way—the same condition I was.

Mr. Pomeroy: What time are you taking [271] recess, your Honor?

The Court: I thought we would run until about fifteen minutes after the hour.

Mr. Pomeroy: I thought if I could have a few minutes now, I could coordinate this and maybe rush it through faster than having to go through notes, your Honor, in a skimpy manner.

The Court: Very well, the Court will be at recess now for fifteen minutes. The audience will remain seated until the jury pass from the jury box. There will be an intermission of fifteen minutes.

(Recess.)

The Court: Now you may proceed, and Mr. Barcott will take the stand again.

Q. Mr. Barcott, 1929 was the first year that you ever made an income tax return, is that correct?

A. I think so.

Q. You paid twelve dollars and seven cents that year, is that right?      A. I think so.

Q. And then you made no income tax return until 1936, is that correct?      A. I think so.

Q. You paid seventeen dollars and twenty-five cents that [272] time.

A. Yeah, I think.

(Testimony of John E. Barcott.)

Q. And in 1937 you paid three dollars and eighty-one cents, is that correct?

A. I think so.

Q. And in 1938 you paid ten dollars and twenty-nine cents, is that right? And in 1939 you paid no income tax, is that right? A. 1939?

Q. You made no return.

A. Didn't I make no return in 1939?

Q. 1940, then. You paid no income tax, is that correct?

A. 1938 the place had burned up, and the attorney is supposed to take care of the estimate on those things.

Q. Well, you paid ten dollars and twenty-nine cents tax, that's correct.

A. I don't know. It was in his hands to take care of that business.

Q. And in 1939 you paid no income tax.

A. The attorney was to take care of that.

Q. But at that time you had on hand about sixty thousand dollars, according to your own testimony here, is that right? A. That's right.

Q. You had sixty thousand dollars on hand, but you had only paid the income taxes that I have just called off here. That's your testimony. Now, in 1929, how much money did you have saved then?

A. 1929. I can't tell you.

Q. Do you know much money you had saved in 1929?

A. I say I was making good money. Save good money. I save good money and I was working good.

(Testimony of John E. Barcott.)

Q. About how much money did you have in the bank which you saved, let's say how much money did you have saved all together, whether it was in the bank——

A. I can't tell you.

Q. ——or in the boxes in nineteen hundred and thirty——

A. I cant tell you that figure.

Q. Well, in 1929 you bought an interest in this boat, didn't you?      A. 1929, yes.

Q. How much did you pay for that interest?

A. Five thousand, three or four hundred dollars, I can't tell you sure.

Q. About fifty-two hundred dollars, wasn't it?

A. Yeah, something like that I think.

Q. Then you went on a note up at the bank in Everett, didn't you? [274]

A. No, I got nothing to do. I pay mine cash.

Q. Did you sign any note at the bank in Everett?

A. I sign a note on account of those, I had to pay, I got so much money myself—my share was all the cash, it was between three partners.

Q. That's right. Your share was paid.

A. Pay the cash.

Q. But the other two partners——

A. The other two partners, he's got no money.

Q. So you signed a note up at the bank in Everett.

A. I had to sign for them note, for them note, to borrow that money for rest of the operation.

(Testimony of John E. Barcott.)

Q. To mortgage the boat. A. That's right.

Q. Is that right? A. That's right.

Q. But you had plenty of money at that time yourself. You could have loaned it to them——

A. I ain't got the money.

Q. You could have loaned it to them yourself, rather than sign a note, if you——

A. No, I no have to do that.

Q. You don't have to do what?

A. I don't have to loan the money to them guys. Why I [275] want to loan the money to them fellas to go in business? I take the big chance, fifteen thousand dollars or sixteen, to put on that boat.

Q. So you signed away, though. you're—I mean, you signed the mortgage on the boat.

A. I signed the mortgage for those guys, to help them out.

Q. And then, that first year on the boat you made about how much money?

A. I got one-third of the share out of it, that business.

Q. How much a share did they pay out of that boat that year?

A. Well, I think we made—I made—I made around, on my share—well, its a share, we made a fifteen hundred dollars on a share. We figure our share, and I call the share one-third. So you figure how much money I got out of that.

Q. Twenty-four hundred dollars, is that correct?

A. It must be.

(Testimony of John E. Barcott.)

Q. And you were making good money at the restaurant at that time.

A. Oh, it was pretty fair.

Q. How much did you make in the restaurant that year?

A. I can't tell you sure what that was.

Q. Did you make five thousand dollars at the restaurant? [276]

A. No that year.

Q. Did you make three hundred dollars a month? Didn't you just tell this jury that you were making good money at that time?

A. Well, it was average I made that much money. Saved that, yeah.

Q. How much money?

A. Between two hundred fifty dollars, three hundred dollars, three fifty.

Q. Then you're—you call that good money, is that it?

A. Seems to me it is all right, but I saved that money, yeah.

Q. So you made twenty-four hundred dollars off of the boat, and about how much from your business then?

A. I can't tell you sure how much it was.

Q. You can't tell for sure, but you saved——

A. But I save, I save, yeah. Well, that was a saving there, it showed a report there.

Q. But you saved all the money you made from the business and what you got from the boat. You saved all that money?

A. I saved that both—both money, yeah.



(Testimony of John E. Barcott.)

Q. And you were living on the tips that your wife took in.

A. She was take care of it, yeah. [277]

Q. That's what you're telling this jury now, that you lived then on what, tips of your wife?

A. She was take care of it, that whole house business, I mean it's all home expenses and everything else.

Q. Then, how much did you make on that boat the next year?

A. We made around a thousand dollars, I think, on the share.

Q. That would be about thirteen hundred dollars for yourself, is that right?

A. Remember that this boat the first year, there is supposed to be some depreciation on it, you know.

Q. Some what?

A. There's a big depreciation on that boat, every year some depreciation.

Q. Some depreciation.

A. Depreciation on the boat the first year. I don't know how much it was supposed to be. And the nets and everything else. There's no full amount, and there had to be, no clear money on that.

Q. Well, how much clear money did you get?

A. Well, it's a clear, I don't know. I made that much money, I can't tell you clear how much it was.

Q. About how much? [278]

A. I don't know. I can't remember that.

Q. Was it a thousand dollars?

(Testimony of John E. Barcott.)

Mr. Ursich: I submit, your Honor, that the witness has answered the question.

A. It's pretty hard to figure myself those things. I know we got a book with every mark down there. I can't tell you that.

Q. All right. How much did you make in 1931 off the boat?

A. I think that was running between four and five hundred dollars. Between four or five hundred dollars of that, clear I got out of it.

Q. About three hundred dollars?

A. No, I know it was a little more than that, but I can't tell you sure what it was.

Q. Four hundred dollars?

A. Four or five hundred dollars, five hundred dollars, four or five hundred dollars, I think.

Q. How much did you make in 1932?

A. I was all along made that much money——

Q. About five hundred dollars a year?

A. Four or five hundred dollars a year, yeah.

Q. Four or five hundred dollars a year. In what year did you sell the boat? [279]            A. Huh?

Q. What year did you sell the boat?

A. 1936, I think.

Q. 1936?            A. Yes.

Q. Twenty-nine, thirty, thirty-one, thirty-two, thirty-three, thirty-four, thirty-five, thirty-six—eight years, is that right?

A. I think so.

Q. And, then you sold the boat for how much?

A. I think thirty-five or thirty-six hundred dollars.

(Testimony of John E. Barcott.)

Q. And you lost how much money on the sale, on what you had originally paid for it?

A. I was pay five thousand and two hundred dollars, that's what I lost, that much on that.

Q. About seventeen hundred dollars?

A. I think so, it must be.

Q. Figuring it out at twenty-four hundred dollars on the first year, twelve hundred dollars on the second year, and five hundred dollars on the next six years, that makes sixty-six hundred dollars, is that right?      A. I believe it is.

Mr. Ursich: I submit to your Honor that those figures speak for themselves. [280]

Mr. Pomeroy: I'm just asking whether or not the——

A. I can't remember just what the figure is.

Q. I'm handing you again what is marked Defendant's Exhibit A-1, and can you tell from your figures in that book the percentage that your food ran to gross sales during the year 1943, or during any period of time in that book

A. '43, you mean.

Q. Uh-huh.      A. I cant tell you, no.

Q. You can't tell.

A. No, the prices was running bad, most of them in fish, you know. We can't tell what the——

Q. You can't tell the percentage.

A. No. You see, my place—my place running—the food cost quite a bit. You see, I got different kind of a set-up than the rest of the places.

(Testimony of John E. Barcott.)

Q. Well, would the percentage of—between the cost of food and the gross sales, be the same in 1943 as it was in 1944?

Mr. Ursich: I object to it, as calling for expert testimony, the witness is not qualified.

The Court: Objection will be overruled. [281]

A. Oh, I can't explain it to you.

Q. Would there be any difference?

A. Well, on the fish—on the fish business it had to be different.

Q. Well, in the restaurant business, you've been in it for so many years, isn't it a fact that you know about what your food costs you, compared to what you take in as your gross sales?

A. Well, there's the Princess Olympia oysters, those oysters, there never was ceiling price on that stuff. They was charged Olympia oysters, that may happen in our place, they can charge you—they was charging from nine dollars to eighteen, twenty dollars a gallon. So I can't tell you how much the food cost—the food cost in my place between those years, and that is because of those city items. City item caused that business. I can't tell you. That is main item in our business.

Q. Well, was there much difference between the year 1943 and the year 1944?

A. It depended the price, that's what I told you, in the fish business, or in the fish there, that was, may happen on the fish there.

Q. Well, was there much difference between the year 1943 and the year 1945? [282]

A. What you mean?

(Testimony of John E. Barcott.)

Q. In the percentage of what the cost of the food is to you and what you sell it for.

A. Well, the cost of the food was all the time more. You see there was things like clam that was out of season that cost of food cost quite a bit. Anyway, I can't tell you sure. There was no ceiling price on lots of things there, on our system we have down there.

Q. In other words, you know nothing about it except the figures that are in the book?

A. That's all there is.

Q. Do you—when did you first think of, or recall—when did you first recall that you had lived off of your wife's tips for the past twenty-four years?

A. What do you mean?

Q. When did you first think of that?

Mr. Hale: If your Honor please, we object to the form of the question.

The Court: Yes. Proceed.

Q. Did you tell the Internal Revenue Agents that you had lived off of your wife's tips for all these years?

A. They never asked me anything, I never tell them anything.

Q. They never asked you anything and you didn't tell them [283] anything. Didn't you tell this jury that you volunteered all the information that you could to them?

A. Volunteer information?

(Testimony of John E. Barcott.)

Q. Volunteered the information to them, about your sources of income.

A. No, not tip business. I never think that was the income business, on that tip business. I never think of anything that.

Q. Weren't you given an opportunity by the Internal Revenue Agents to tell them all the sources of your income?

A. I never speak very much with them.

Q. Did they ask you and give you an opportunity to tell them all your sources of income at the time that they were inquiring into your affairs?

A. I speak once with them, and my attorney was with me, I speak once between those books, that's all there is. I never speak anything on that thing. He never asked me any question where is the income go or anything else. They never asked me anything else.

Q. They never asked you what your sources of income were?

A. I was speak once with them.

Q. Well, you spoke with Mr. Nielsen once, didn't you?

A. Once, but he never asked me about the books or anything before. [284]

Q. Didn't you speak with Mr. Swanson and Mr. Nielsen again?      A. Yes.

Q. How many times did you talk to Mr. Swanson and Mr. Nielsen?

A. I was once—well, when we went down the book—box, the second time we was with my attorney then.

(Testimony of John E. Barcott.)

Q. Didn't you talk with them in your place of business also?

A. Just once, he come in and ask me, there's many what day——

Q. Did you talk to them at any time in your place of business?

A. Yeah, once they ask me——

Mr. Gagliardi: If your Honor please, I object——

A. ——for certain question.

Q. Then did you go up to the office, his office, Mr. Swanson's office another time?

A. Not myself alone.

Q. You never did?

A. I don't think so, I wasn't myself alone, my attorney was with me second time.

Q. Didn't you bring the books up there alone one time?      A. I bring the books once.

Q. Without your attorney? [285]

A. But he says I leave the books there, and then I leave the books, he wanted to check up the books.

Q. Weren't you asked by these Internal Revenue Agents to tell the sources of your income?

A. Something about the food—well, my attorney was with me——

Q. Just a moment. Mr. Barcott, didn't you tell the Internal Revenue Agents about your fish boat and about your income from that?

A. Oh, yes, that's——

Q. Well, where was that?

A. That was in—the first time.



(Testimony of John E. Barcott.)

Q. All right. Weren't you asked for other sources of income, what other sources of income that you had?

A. That's how I told them about the boat.

Q. Weren't you asked to give them all the sources of your income at the time that you——

A. Yeah, but I never give them any sources on that tip business, and something like that, I told them, I says, "I made a little money on the boat and some place else. Thats all there is." He never asked me very many question.

Q. You knew you were being investigated for income tax, didn't you? [286]

The Clerk: Plaintiff's Exhibit No. 19, for identification.

A. Not the first time, but after while, yeah, after.

Q. You are being handed what is marked for identification as Plaintiff's Exhibit No. 19. Will you tell the Court what that is, if you know?

A. I can't read that thing. I can't read that, no.

Q. You can't read it?

A. My glasses is no good. If you can, somebody else can, my attorneys read those things.

Q. You say you can't read them.

A. Not with these glasses, yeah.

Q. You have no other glasses?

A. No, I got no glasses with me, no.

Q. Well, do you have other glasses that you can read with?

A. Well, I got—I got glasses home.

Q. Your glasses are home that you read with.

A. That I read with.

(Testimony of John E. Barcott.)

Q. You didn't bring any glasses to Court that you can read with.

A. Well, that's—I never think of that.

(Whereupon paper was handed to Mr. Gagliardi.)

Mr. Gagliardi: We will object to that. We will object to the introduction of that exhibit, your Honor. I examined it and I think it highly improper——

Mr. Pomeroy: I have no objection to the Court seeing it and then——

Mr. Gagliardi: ——irrelevant and incompetent. In order for the record to be clear, we object, that the document is incompetent, irrelevant and immaterial, and not a proper issue in this case.

The Court: I think I shall have to sustain the objection at the present stage of the record. I——

Mr. Pomeroy: If the Court please, I may point out that the defendant—this is cross-examination, and the defendant on his direct examination said that he had volunteered all information to the—to the authorities and that—also that, as I recall it, that they didn't ask him what his sources of income were, that's why he never told them that.

The Court: Well, of course, this letter is dated in March. It is dated March 1946, and the first interview was in February or January of approximately '46. [283]

(Testimony of John E. Barcott.)

Mr. Pomeroy: That's correct. However, the time element continues to the present time because of the statement of the defendant that they never did ask him what his sources of income were. And here we have it——

The Court: I do not recall his testimony to that effect.

Mr. Pomeroy: Well, we'll ask now. Wasn't that his testimony?

Mr. Gagliardi: I didn't get the question. Mr. Reporter, will you read me the question?

The Court: You may ask him the question directly, again.

Mr. Pomeroy: Very well.

Q. Were you ever asked by the Internal Revenue authorities to state all of your sources of income?

A. What do you mean, state all of the sources of income.

Q. To state all the places where you obtained any money.

A. I don't remember that. I can't remember it at all.

Q. Would you say that they did not ask you?

A. Well, I can't remember those things, you know. I don't remember——

Q. Can you say that they did not ask you? [289]

A. Can I say they no ask me? They ask me some question there, but I can't tell you where, what——

(Testimony of John E. Barcott.)

Q. You don't know what they were. On your first meeting with Mr. Nielsen you went to your box in the National Bank of Washington, is that correct?

A. Yes, from the office, yeah.

Q. And there, Mr. Nielsen inventoried the contents of that box, is that correct?

A. What do you mean, inventory?

Q. He made a list of all of the contents of that box, isn't that right?

A. I think so, they was check all them business there.

Q. You showed him everything that was in that box.

A. He—yeah—he was there, he check up himself. He came up and check them.

Q. Why didn't you tell him about the other box at that time? The one down in the Washington Building.

A. He never ask me for anything any more.

Q. You didn't tell him about it either, did you?

A. Well, I never tell him anything, he never asked me anything.

Q. Why did you run right out to the other box after you left that place with Nielsen?

A. I no run up, I went to the place, when I left him I went [290] to the place. I got a policy with me and I went down to the box and put the policy in there. I never think——

(Testimony of John E. Barcott.)

Q. Didn't you tell this jury that when you went up to see Nielsen you didn't even have the key on you, you had no money on you. You went back to get a key and you found the money down there and then you took him up to the National Bank of Washington.

A. Oh no, just a minute.

Q. Now you say you say you have insurance policies on you, is that right?

A. I got the—when I left Mr. Nielsen I turned around, I went to the place, and they I got a couple of insurance policy I put in that box there, but after I left Mr. Nielsen, not before. And when I left Mr. Nielsen first time, I went to the—to my Oyster House, and get that twenty thousand dollars, one thousand bill with me, and I went down there meet him.

Q. And you thought you had ten thousand, but you had twenty thousand.

A. No, I knew there was twenty thousand there.

Q. Why were the two packages marked five thousand dollars each?

A. No, they was no marked, two packages, it was an envelope [291] there, envelope with this money, I didn't know if there was any receipt there on those packages.

Q. And weren't those envelope marked five thousand each?

A. I know why, there was one envelope that both of those went into.

(Testimony of John E. Barcott.)

Q. And wasn't it marked five thousand, on two bundles?

A. Well, I believe there was a slip there, I don't know what kind of slip there.

Q. Do you have that slip now? A. No sir.

Q. Where is it?

A. I don't know where is it.

Q. Well, you kept it, didn't you?

A. What slip?

Q. Yeah. A. Why do I want to keep a slip?

Q. Well, was it in your safe deposit box?

A. That was no bank slip or anything; if anything was there it was in the box. That I know——

Q. Is it still there? A. Huh?

Q. Is it still there? A. What? The slip?

Q. The slip. [292] A. No sir.

Q. Where is it now?

A. I don't know, I spend that money.

Q. You spent the money. A. Yeah.

Q. Twenty-one—twenty-three thousand?

A. Well, not whole business, but part of that money I spent.

Q. Then, Mr. Nielsen's testimony about you making an offer to him is not correct, is that right?

A. No sir, that's absolutely not true.

Q. That's absolutely not true? A. No sir.

Q. You made no offer to him whatever?

A. Nothing.

Q. It's not true. A. No sir.

Mr. Gagliardi: Well now, if your Honor please, he answered that question three times. I am objecting——

(Testimony of John E. Barcott.)

The Court: Objection will be overruled.

Q. Then you left there and went immediately to your other safe deposit box.

A. I passed by over there, and I went down there, I got a [293] policy in my pocket, coat pocket, and I went down there and put the policy there in that box.

Q. And you hadn't told Nielsen about the other box.

A. No, he never asked me for anything, I don't know nothing about it. He never asked me so many questions.

Q. Then did I understand you to tell the jury a little while ago that you didn't go back to the box in the basement of the Washington Building until February 13th, from January 28th, is that right?

A. I don't know I did—no, that was—I remember that that day I was in that box, and the slip is over there.

Q. What?

A. There is a slip over there show me—they show me that I was in that box that day.

Q. That day.           A. Yeah.

Q. That was the day that you went there with Nielsen, isn't that right?

A. What box, down below?

Q. You went to both boxes on the first day with Nielsen.           A. Yes.

Q. Then did you tell this jury that you did not go back to the basement of the Washington Building until February 13th when you went with Swanson and Nielsen? [294]           A. No, no—I told—



(Testimony of John E. Barcott.)

Mr. Ursich: Your Honor, it seems he is asking the witness to repeat what he has already told. If he has some matter he wishes——

The Court: Just make your objection, if you have one.

Mr. Ursich: Very well, if your Honor please. I object to the form of the question, on the grounds and for the reason that it indicates something which has already been answered.

The Court: Objection will be overruled.

Mr. Ursich: Thank you, your Honor, allow me an exception.

The Court: You have an exception to all adverse rulings.

Mr. Pomeroy: Will you read that question to the witness, please?

(Question read.)

Q. What is your answer to that question?

A. I was in that box, the slip will show that I was in that box after I left Nielsen.

Q. Then when did you next go back to that box?

A. I don't—I don't remember.

Q. You don't remember. [295]

A. No sir, I don't remember at all.

Q. You may have gone before you went back with Swanson and Nielsen.

A. When? I don't know, I don't remember.

Q. You went back there the next morning, didn't you?

A. I can't remember very sure if I was or not.

(Testimony of John E. Barcott.)

Q. Handing you Plaintiff's Exhibit No. 11, I'm asking you to look at the first, or top sheet, and read that to refresh your recollection.

A. That's my name, all right. That's my name.

Q. What date does it show on the back of that slip? No, the first sheet. The first sheet.

A. January 9 and—I mean, February, I think, that's what it is. Then, twenty-nine—I don't know, I can't read right with these glasses.

Q. Will you give it to me please? It reads January the 29th at two minutes after nine in the morning. That means that you signed this slip to get into that box in the Washington Building the next morning at nine o'clock, after you had been there the day before. Why did you go back there then?

A. If I went over there, I got lots of paper there, lots of stuff there in that box.

Q. Well, I thought you just kept your insurance policies [296] there.

A. If I went there—I got deed, we got the paper, I got the lease, and all that kind of a stuff there.

Q. Why did you go back again on this day?

A. I was—huh?

Q. What did you get on this day?

A. What I get on that day?

Q. Yeah.

A. Well, maybe I went to see some paper there, or something like that.

(Testimony of John E. Barcott.)

Q. You had been there at twelve forty-five p.m., just after you left Nielsen the day before and put some insurance policies in there, according to your testimony. A. Yes.

Q. What did you go back for the next morning at nine o'clock?

A. I got—what do you think, I got no business to go in that box? Who's going to stop me going in my box there? I can't—

Q. Nobody. We just want to know why you went.

A. Why, I got some paper there, all kinds of stuff there. I no went down there for money or anything else. I got no money.

Q. What papers did you go there for? [297]

A. I got some papers there, policy and paper, and lease, and all kinds of stuff.

Q. What papers did you go for—

A. Well, I can't tell you right—

Q. —on the morning of January 29th at nine o'clock?

A. What do you want to ask me for that—I got a bunch of that stuff there, in that box.

Mr. Pomeroy: That's all. No more questions.

The Court: Have you any re-direct?

Mr. Gagliardi: Yes, your Honor.

#### Redirect Examination

By Mr. Gagliardi:

Q. Mr. Barcott, during the year 1943, what was the legal method that you had to run your restau-

(Testimony of John E. Barcott.)

rant? What was the condition upon which you had to run it? Did you have any rules or regulations from the government?

A. No sir.

Q. And what was the condition upon which you were permitted to run the restaurant?

A. Well, it's a point business it was there. [298]

Q. Point business. A. Yeah.

Q. And what was the condition of your bill-of-fare?

A. It was a pretty low bill-of-fare. The reason, frozen menu was there and it was pretty low bill-of-fare on that time.

Q. The menu was frozen? You mean to say—what do you mean by the “menu was frozen”?

A. By the government. We can't charge any more.

Q. You can't charge any more than a certain price. A. Yeah.

Q. And was that the same rule in 1944?

A. Yes.

Q. And what were the condition of your obtaining the needed supply or provision for your restaurant at that time, under this point of business?

A. I had awful time on that thing.

Q. What was—your main business in that place, what were they? Was it meat or fish?

A. Well, there was quite a bit of meat, and grease, lard, and the fish.

Q. Well, you call your place the California Oyster House. A. Yes, sir.

(Testimony of John E. Barcott.)

Q. Did you specialize in any particular food?

A. Yeah. [299]

Q. What kind of food did you specialize in?

A. I specialized steaks.

Q. And what else? A. Olympia oysters.

Q. And what was the price before your menu was frozen, for the Olympia oysters that you was purchasing? What was your cost?

A. I think they was around ninety cents an order.

Q. Ninety cents what?

A. Ninety cents order, ninety-five cents order average, the stew and the pan roast.

Q. No, no, you didn't understand my question. When you bought the Olympia oysters, what did you have to pay? By the quart or gallon.

A. I had to pay either quarts or gallon and it was about——

Q. How much did you pay before the war started?

A. It was about nine dollars, nine and a half dollars, something like that.

Q. And how much were they in 1943, after we got into the war?

A. They was, I think, fifteen, sixteen dollars or more.

Q. And in 1944?

A. They was more than that.

Q. Your price for oysters was frozen? You couldn't charge [300] any more than you were charging before the war?

(Testimony of John E. Barcott.)

A. Yeah, I can't charge any more, as my menu was frozen.

Q. Your menu was frozen. Was the cost of your oysters frozen? Was the Government freeze the oysters? Was there any ceiling price on them?

A. No sir, no, and lots of things beside.

Q. And what else was not—without a ceiling price? What other food?

A. There was—there was, I think, crab meat for a while there.

A. Crab meat?

A. Yeah, there was a ceiling price for a while, but they jumped up so high. When my menu was froze, I used to pay forty-five cents a pound.

Q. Yes.

A. And when the—the menu was frozen, but crab meat never was frozen, you know. They was raise the prices on it.

Q. And what did you have to pay afterwards?

A. That was ninety or a dollar a pound.

Q. And what was the condition of obtaining any oysters, were they easy or hard to get them?

A. Well, it was—if you fight for anything you can get it.

Q. What was the condition of obtaining the meat?

A. Meat, it was hard to get it. [301]

Q. Even though you had points?

A. Yeah, I had the point.

Q. Yes, but even though you had the point, it was hard to get?

A. You can't get it.

(Testimony of John E. Barcott.)

Q. Well, was the true also for 1945, up to the end of the war? A. Yes.

Q. And what about 1946, were condition the same?

A. I think so, it was yeah. If anything, it was better, we can get more food out of it.

Q. You could get food more—— A. Yeah.

Q. ——easily. A. Yeah.

Q. And in January and February then, of 1946, it was easier to obtain your supply?

A. More easy than it was before.

Q. Was the ceiling price still in effect?

A. I think so, that——

Q. Were the point still in effect at that time, or do you know?

A. Yeah, I think so, I don't know really, you know, that was—I don't know when it was out, really, you know. [302] I can't tell you sure. I went out of business in February, so I don't know what was the point.

Q. When did your son come back from the war? Anton.

A. I think he come back in 1946, I believe it was '46.

Q. Prior to January 1, 1946, or after?

A. He come in—he take the business about—right away, a month after he come back from the service.

Q. About a month after he come back from the service. A. I think so, month, yeah.



(Testimony of John E. Barcott.)

Q. And when did he take over the business?

A. He take—they close the place March 1st and do some work on it, make the bigger room, dining room, and put more table in there, and he open up March 1st.

Q. And did he do any work, or did he work in the restaurant prior to the time that you turned it over to him, if you know?

A. What do you mean?

Q. Did he come back to work in the restaurant before he took over the restaurant?

A. No, I don't think so. I don't——

Q. You don't remember.           A. Yeah.

Q. Now, in the house you say there are two stoves, you mean two cooking stoves, or—— [303]

A. No, one cooking stove, one heating stove was there.

Q. What kind of a heating stove?

A. I got oil heater.

Q. Oil heater?           A. Yes sir.

Q. Do you have any electric heaters in the house?

A. We got right now, it's about couple of years ago, something like that.

Q. But before that you had the——

A. No electric heater in the house that time, I had a oil stove.

Q. But you have electric heaters now?

A. Now.

Q. How many do you have?

A. I got two heating stoves, they cost thirty-five dollars apiece.

(Testimony of John E. Barcott.)

Q. Two heaters and a—electric range.

A. Yeah.

Q. In 1940, Plaintiff Exhibit 18, your return in 1940 shows a loss that you sustained during that year. Does that show also the expenses that you sustained in repairing and remodeling the place?

A. That's what it is there. You see, they put everything in one year, those repair bill. That's what I understood now, see there was put everything, they put depreciation, make depreciation for so many year, I [304] never lose money that year.

Q. But they put all of the repair in one year?

A. All the repair, the remodel that place 1940, they put in one year there.

Q. How much did it cost you to remodel the place? Approximately, not to the penny.

A. About four or five thousand dollars.

Q. How much?

A. About four of five thousand dollars.

Q. Four or five thousand dollars, and that's what shows the loss, the repair they were charging in one year?      A. Yeah.

Q. Who prepared this income tax report for the year 1944?      A. '44?

Q. In 1940.      A. That's Tom Ray did.

Q. And in items number 17 show rent and repair—      A. Yeah.

Q. —seven thousand, two hundred and five dollars and sixty-eight cents.

A. I think so.

(Testimony of John E. Barcott.)

Q. And who give that figure to Mr. Ray? Who give those figures to him?

A. He do the figuring himself.

Q. How much rent were you paying per month, per year, for [305] the place? How much rent?

A. How much rent in my business?

Q. Yeah, in 1940. Yes, how much rent were you paying in 1940? A. I paid my share there.

Q. How much, how much was it?

A. Well, I took a lease, I don't know, I got a lease there for a hundred seventy-eight dollars a month.

Q. Yes?

A. I don't know how much rent there was, around eighty, ninety dollars, I think so.

Q. You mean you have a lease for more than your place?

A. For about three years from that time, yeah.

Q. I mean, did you have a lease for more than your restaurant? What else was included in your lease?

A. Oh, there was the cigar stand?

Q. The cigar stand?

A. And the barber shop, yeah.

Q. And the barber shop. A. Yeah.

Q. And how much you was paying on the whole rent, how much was it for the both places?

A. A hundred seventy-five dollars, I think.

(Testimony of John E. Barcott.)

Q. A hundred and seventy-five dollars. And how much you [306] pay—how much did the other people pay you out of the hundred and seventy-five?

A. One was pay the fifty, and the other he was pay the thirty, something like that.

Q. And so your rent would have been about a hundred dollars a month?

A. Yeah, something like that.

Q. And the balance of the seven thousand, two hundred five dollars and sixty-eight cents was repair?

A. Yes.

Mr. Gagliardi: That's all.

#### Recross-Examination

By Mr. Pomeroy:

Q. Mr. Barcott, as a matter of fact in 1943, '44 and '45, the Army had a lot of men out here at Ft. Lewis, isn't that right?

A. That's right.

Q. The Navy had a lot of men around here, didn't they?

A. That's right.

Q. The shipyards were running full scale here in Tacoma.

A. Yes sir.

Q. In 1946 that wasn't true, was it? [307]

A. Huh?

Q. In 1946 that wasn't true, was it?

A. They was there too, I think.

Q. In 1946 were your shipyards running?

A. Well, I no say the shipyards, but there was—there was quite a bit bunch of people around here too just the same.

(Testimony of John E. Barcott.)

Q. But were there as many people around here in 1946 as there were in '45?

A. Well, you no—you can't figure that way——

Q. I just asked you the question. Were there as many people around?

A. There was quite a bit of people around here, and they eat in the restaurant on account of the food.

Mr. Pomeroy: That's all.

Mr. Gagliardi: That's all, Mr. Barcott.

(Witness excused.) [308]

### KATIE K. BARCOTT

produced as a witness on behalf of the Defendant, after being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Gagliardi:

Q. State your name to the Court and jury, Mrs. Barcott. You sit down, please. Will you state your name to the Court and jury?

A. Katie Barcott.

Q. Katie Barcott?

A. Kate—K. K. Barcott.

Q. And you are the wife of John Barcott?

A. Yes, sir.

Q. How many children do you and John have?

A. We have two of our own.

Q. Two of your own, and did John have a child of his own?

A. Yes.

(Testimony of Katie K. Barcott.)

Q. What's his name? A. Anton Barcott.

Q. What's the name of your children?

A. John and Mary.

Q. And Mary. Where are they?

A. Mary is married and John is married. They're both married. [309]

Q. They are both married. Do they live here in Tacoma? A. Yes, sir.

Q. When did you come to Tacoma, Mrs. Barcott?

A. Oh, about 1916.

Q. And prior to coming to Tacoma where were you? A. In Aberdeen.

Q. In Aberdeen. Were you married there, in Aberdeen? A. Yes.

Q. And what did you and your former husband do? What happened to you two?

A. Well, it was worrying with his trouble. We didn't get along all right.

Q. And was there a separation or a divorce?

A. It was divorce.

Q. When was that divorce made?

A. In 1915.

Q. 1915. In that divorce did you receive any money settlement from him? A. Yes, sir.

Q. Huh? A. Yes.

Q. How much?

A. Oh, about, close to four hundred dollars, it was something in there, I won't swear, because——

Q. How much?

A. Close to four thousand dollars.

(Testimony of Katie K. Bareott.)

Q. Close to four thousand dollars. And, after you divorced your husband in Aberdeen, you came to Tacoma, you say?      A. Yes, sir.

Q. What did you do in Tacoma?

A. I was living with my father and mother.

Q. Yes?

A. And I was keeping a boarding house.

Q. Boarding house.      A. Yes.

Q. Where was your boarding house?

A. In Old Town.

Q. Orting.      A. Old Tacoma.

Q. Oh, Old Tacoma. And for how long did you keep that boarding house?

A. Oh, I was there till 19—1918.

Q. Until 1918. Well, did you make any money or lose any money on running the boarding house?

A. I didn't lose any; we was making a living there.

Q. And did you save any money from that?

A. Yes, sir.

Q. Then, what else did you do after that? [311]

A. I was working—let me think, Wheeler Osgood Door Factory.

Q. Wheeler Osgood Door Factory. What were you doing there?

A. I was working in the dry room. I was cleaning in the dry—kiln.

Q. How long did you work there?

A. Well, I worked there before I went away.

Q. And where did you go after you went away? Where did you go?      A. I went to California.



(Testimony of Katie K. Barcott.)

Q. Where? A. Oakland, California.

Q. And what did you do over there?

A. I was working in a Pullman car.

Q. Huh? A. Pullman car.

Q. Pullman, what to do? A. Cleaning.

Q. And what else did you do in California besides that?

A. I was working in a cannery.

Q. And how did you work in the cannery, by——

A. Piece work.

Q. Piece work. A. Yes, sir. [312]

Q. How much did you earn while you was working in California?

A. There it was a good wages, I couldn't swear to it, but it was good wages.

Q. About how much?

A. You see it was—it was some day I was making more, all depends how I feel. If I feel like working faster, I make more; but I never did make less than about seven dollars or seven and a quarter, something on that order.

Q. And then did you come back to Tacoma?

A. Yes sir.

Q. When did you go to the California Oyster House? A. I started there in 1920.

Q. In 1920. And what did you do there?

A. What did I do there? Q. Yeah.

A. I was waiting the table.

(Testimony of Katie K. Barcott.)

Q. And what else, if anything?

A. And I was scrubbing, after I get through, clean the House after they close up the place I just clean up the House, we didn't have no janitors there.

Q. And what time would you go to work, in the day shift or night shift?

A. I worked nights. [313]

Q. You worked night shift. A. Yes sir.

Q. Who did take care of the day shift?

A. Who take care of day shift? Q. Yeah.

A. Well, Mr. Barcott sometime, he worked day-time and I worked **nights**.

Q. You were working nights. And between 1920 and 1926, did Mr. Barcott have any partner in the business?

A. I beg your pardon, I didn't understood that.

Q. I said between 1920 and 1926, did your husband have a partner in the business?

A. Yes sir.

Q. Who was he?

A. John Orb—that was his cousin.

Q. And were you being paid a wage while you was working there?

A. Yes sir, I—he was paying twenty-five dollars.

Q. Twenty-five dollars for what?

A. Twenty-five dollar working there, for waiting the table.

Q. Well, a day, or month, or week?

A. A day—I mean, a week, I beg your pardon.

Q. A week. [314] A. Yes sir.

(Testimony of Katie K. Barcott.)

Q. Your custom is weekly wages, is that it?

A. Yes sir.

Q. And twenty-five dollars a week.

A. Yes.

Q. And that—now, at the time that you and Mr. Barcott got married, did you have any money?

A. Yes, I had six thousand dollars, before I married Mr. Barcott.

Q. You had six thousand dollars.

A. Yes—oh, probably it might be a little—a few dollars less than six thousand, maybe it was more. I couldn't swear to that, but I know it had it.

Q. And where did you keep your money?

A. I keep it with me.

Q. Huh? A. I keep it with me.

Q. Where, with you? A. In a mattress.

Q. In the what?

A. In my mattress—under my mattress.

Q. Why didn't you put it in the bank?

A. Because I didn't believe in the banks. My folks didn't believe it, and I didn't believe it either.

Q. Why didn't you believe, didn't you trust the bank? A. No, I didn't trust the bank.

Q. Well, did you have—you say you had six thousand dollars. A. Yes sir.

Q. What did you do with that six thousand dollars?

A. After we got married I give it to my husband.

Q. And what did he do? Where did he put it?

A. Whatever he done with it, I never asked him.

(Testimony of Katie K. Barcott.)

Q. Well, what did he do with the money?

A. He used it in the business and he keep it with him.

Q. Well, where did he keep the money, do you know?      A. In the safe deposit box.

Q. In the safe deposit box.      A. Yes sir.

Q. And did all the money and profit that you was making go into the safe deposit box?

A. I imagine; I never asked him.

Q. Didn't you ever ask him?      A. No.

Q. Well,—

A. I trusted my husband. Whatever he done with it, I just trusted him with it.

Q. Well, didn't you know whether he went in there or not? [316]

A. When he went in there?

Q. Yes.      A. I don't know.

Q. You don't. Well, now during the time that you was acting as a waitress, up to 1926, you was receiving a wage.      A. Yes.

Q. Did you get any other money beside the wage?      A. Yes, I had tips.

Q. Tips.      A. Yes sir.

Q. In this California Oyster House, what kind of a meal do you serve? Do you serve lunches or special dinners, special—

A. We—well, it's more oysters and food like that, you know, it was more in seafood.

Q. More in seafood?      A. Yes, and steaks.

Q. And you said you received tips?

A. Yes sir.

(Testimony of Katie K. Barcott.)

Q. What was your daily average, tips that you would make?

A. My tips never was less than seven dollar, and always more than that.

Q. And how many hours would you work? [317]

A. I worked there eight hours—eight hours I work and lots of times when the—we have the help that is sick or something, and I work more hours in there. I stay pretty near two shifts lots of times.

Q. You stayed for two shifts?

A. Yes, many times. A fellow we had there that would work once in a while, he'd get drunk or something, and then I'd have to stay another shift.

Q. And after 1926, when your husband purchased his partner out, did he buy the partner's interest in the restaurant?      A. Yes.

Q. And after 1926, did you receive any more wage?      A. No, I didn't.

Q. And did you work in the restaurant?

A. Yes sir.

Q. Until when?      A. I worked till 1938.

Q. In 1938. And what was your average daily tips that you received?

A. I said one—not less than seven dollars. Always more, never less than seven, and it would be more, and Saturday especially. I was making from ten to twelve dollars and more than that.

Q. And what did you do with that money? [318]

A. I paid the home expenses. buy what I needed for the house——

(Testimony of Katie K. Barcott.)

Q. Who bought the furniture for the house?

A. I did.

Q. With what money?

A. With my money.

Q. You mean your money from the tips?

A. Yes sir.

Q. And who paid the running expenses of the house?

A. I paid the expenses in the house, and I didn't have very much expenses.

Q. How much would be your expenses, Mrs.—

A. It wouldn't be even fifty dollars.

Q. What was your mode of living, did you have any automobile?

A. No sir.

Q. Did you buy any jewelry?

A. No sir.

Q. Did you buy any silver?

A. No.

Q. What—how much furniture have you got in the house?

A. I buy furniture. I have a davenport, and we got a dining room set, and I gotta two rugs, and I got than since 1926. [319]

Q. How much did you pay for them?

A. I paid three hundred and fif—three hundred and twenty-five dollar for my davenport set.

Q. For what?

A. For my davenport.

Q. For dining room set.

A. Dining room set. Well, davenport and chair, how would you call that? That's what I call it.

Q. That davenport and chair?

A. Yes.

(Testimony of Katie K. Barcott.)

Q. And how much did you pay for that?

A. Three hundred and twenty-five dollars, when I get move in—when we move in the house, I buy that.

Q. You bought the house when? 1926?

A. 1926.

Q. And prior to that, where were you living?

A. Before that?

Q. Yeah.

A. I was living on Fawcett Avenue.

Q. Who did you live with?

A. Who I live with?

Q. Who, yeah.

A. Well, my mother was living with me, and my husband and kids, and I had roomers. [320]

Q. How many roomers did you have?

A. Oh, I had—sometime I had five, sometime I had six.

Q. How much the roomer would pay you?

A. Well, they never paid me less than three and a quarter—well, it all depends, you know, how—

Q. Three or four dollars a week, or day?

A. Yeah,—no, a week.

Q. A week?

A. They pay me—they would be—you see, the guys would sleep in the same room. It wasn't a very big house.

Q. Yes?

A. And we used to—they used to pay me about—you know, it's a long time ago, it's hard to tell you this.



(Testimony of Katie K. Barcott.)

Q. Well, was,—you——

A. They paid me the room there where they were staying, and it is so hard to tell and remember after so many years how much exactly it was. But I know that they—I used to wash clothes for them. I remember that, how much they paid me for that.

Q. How much did they pay you for that?

A. They paid me a dollar and a half a week.

Q. For washing their clothes.

A. For washing their clothes.

Q. Were these people countrymen of your people? [321] A. Yes.

Q. How did the income from their room rent and the washing of the clothes compare with the payment of the rent?

A. I always paid my rent with that, that's what I meant.

Q. With that you paid the rent of the house?

A. The rent. I never had to pay no rent for my house ever since I been married.

Q. And then in 1926 you say you purchased the house. A. Yes sir.

Q. Now, what were the expenses of running the home in the way of the children? You had three children there. A. Yes.

Q. Now what clothes did you buy the children?

A. I used to buy clothes at rummage sales till 1926 and 1928, they was cheap. I buy new shoes for fifteen cents, twenty-cent shoes, and coats for seventy-five cents, and make clothes over for my kids.

(Testimony of Katie K. Barcott.)

Q. Did you make it yourself?

A. Sure, I made over some for the kids. I hired sometime a woman, it wouldn't cost me—it was cheap, and I give it to the woman to make it for me. And /I, for myself, I used to buy me clothes, I could buy me a nice coat for seventy-five cents, a dollar and a quarter. Even today I could go and get it, and I get it sometime now. [322]

Q. Now, did you buy any clothes for yourself——

A. Yes, I did.

Q. How often did you buy clothes for yourself?

A. Well, I buy for myself clothes when I needed them. It's five years I /didn't buy nothing hardly. Just—just the last year.

Q. Did you buy any expensive coats at any time?

A. Yes, I buy me a fur coat and it cost me a hundred and sixty-five dollars.

Q. When was that you buy that?

A. That's eight years ago.

Q. Is that the only coat that you bought?

A. Yes, until nine—until a year ago.

Q. Until a year ago.

A. Until a year ago.

Q. And what did you buy last year?

A. I buy me another fur coat.

Q. How much did you pay for——

A. I was ashamed to wear that any more. I buy that one, and I pay three hundred and twenty-five dollars.

Q. And that's the most money that you spent, on your coat?

A. Yes sir.

(Testimony of Katie K. Barcott.)

Q. Prior to buying that fur coat, did you buy—what would be the price of all the—your clothes, what would be [323] the maximum you pay for them?

A. Well, I couldn't tell you. Sometime I buy me a dress that cost me eight—eight dollars, or six dollars, or ten dollars, that I'd buy me, but I didn't buy nothing for five years, ever (since war started, hardly anything, just the last year I buy me something.

Q. And did you buy anything during the time you was working in the restaurant, to amount to anything?

A. Yes, I did.

Q. What did you buy?

A. Well, I buy me dresses and what I needed clothes.

Q. How much would you spend a year in clothes for yourself?

A. I couldn't tell you how much I spend.

Q. How much, more or less?

The Court: Mr. Gagliardi, we will have to get along. I have given you considerable latitude.

Q. Now, Mrs. Barcott, who else worked in the restaurant besides yourself?

A. Orb, my son, and my husband and I.

Q. When did your son come to work in the restaurant?

A. And the help too. I beg your pardon?

Q. When did your son begin to work in the restaurant? Came to work in the restaurant. [324]

(Testimony of Katie K. Barcott.)

A. Well, he came over here in 1925, and I think he started working two years after that, two or three years, something like that.

Q. And he worked until when?

A. He worked in—he's now, he's working, until he went in the Army.

Q. Well, prior to—did you pay him any wage for what he was doing?

A. I don't think my husband pay him any wages.

Q. Until when?

A. Till he started—till he got married.

Q. And when did he get married?

The Court: I think that's irrelevant.

A. 1934, I think.

Q. Then did the other son work in the restaurant?

A. Yes, he quit school, he didn't want to go to school, so——

Q. Did he get any pay for working in the restaurant?      A. No.

Q. What did you people do with the money that you make in the restaurant, all of you working in there?

A. Well, my husband was taking care of it.

Q. What was he doing?

A. He was taking care of the money. He just put it in the [325] safe deposit and keep it there.

Q. And does your husband have any bad habits?

A. No sir. That was the funny part about it. I have to put up with the devil.

(Testimony of Katie K. Barcott.)

Q. Were the money that you were receiving from the tips sufficient to pay all your household goods, expenses, and buy the clothes for yourself and children?

A. I give it to my husband.

Q. How's that?

A. I give it to my husband.

Q. Well, I asked you the question whether or not the money that you made out of your tips were sufficient or more than what you spent in running the house, buying clothes, and take care of the children.

A. I didn't quite get you there.

Q. I said, was the money that you received from the tips sufficient to pay the running expenses of the house and buy the children's clothes and your own?

A. Yes, I could—with that I could buy and I saved lots more on top of that.

Q. What did you do with what you saved? The excess——

A. The money that I saved? I give it to my husband.

Q. For what purpose?

A. Because I didn't need it, and I let him put it away. [326]

Q. Put it away.           A. Yes.

The Court: Any further direct examination?

Mr. Gagliardi: I think that's all, your Honor.

(Testimony of Katie K. Barcott.)

Cross-Examination

By Mr. Pomeroy:

Q. Did you take any trips during all this time you were married? A. Yes.

The Court: Were you through, Mr. Gagliardi?

Mr. Pomeroy: I thought he said he was through.

Mr. Gagliardi: Yes sir, yes, yes.

The Court: All right then.

Q. Where did you go?

A. I beg your pardon?

Q. Where did you go on your trips?

A. Where did I go on my trips? When?

Q. Have you gone on any trips?

A. Sure I went on trips. [327]

Q. Where? A. In Europe.

Q. To Europe. When did you go to Europe?

A. 1931.

Q. How long did you stay in Europe?

A. Just exactly hundred days.

Q. A hundred days. A. Yes sir.

Q. Did you ever take any other trips?

A. No sir.

Q. You've never been down to Aberdeen?

A. No sir. Oh, I've been in a car. My friends take me in a car.

Q. Your friends take you in a car.

A. Yes sir.

Q. How long did you stay there then?

A. How long did I stay? Just go for the trip and come back.

(Testimony of Katie K. Barcott.)

Q. Have you ever been down to California?

A. Oh, sure I've been to California.

Q. When?

A. Oh, let's see. When was the World Fair?

Q. You went down to visit the World Fair?

A. Yes. [328]

Mr. Pomeroy: That's all.

Redirect Examination

By Mr. Gagliardi:

Q. How much money did you spend in going to Europe? A. My—in Europe?

Q. Yes. How much——

A. Not very much, I'm telling you that much.

Q. How much? A. I don't know——

Q. Approximately.

A. Probably I don't believe it was more than—we figured, but it take me altogether I think it take about fifteen hundred dollars.

Q. Fifteen hundred dollars. A. Yes.

Q. How much money did you spend in going to the World Fair in California?

A. We didn't take anything only these friends take us in a car and we just paid for the expenses.

Q. How much were the expenses?

A. Well, I don't know, just what there was for the gas——

Q. Couldn't you give us an estimate?

A. I couldn't give you an estimate on that.

Q. Would a thousand dollars be—— [329]

A. Oh, no.



(Testimony of Katie K. Barcott.)

Mr. Pomeroy: She's answered it.

The Court: She answered. She can't give you any information.

Mr. Gagliardi: Well, I would just like to get the answer approximately.

That's all.

Mr. Pomeroy: That's all.

(Witness excused.)

### ANTON BARCOTT

produced as a witness on behalf of the Defendant, after being first duly 'sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Gagliardi:

Q. You may state your name to the Court and jury.      A. I beg your pardon?

Q. You may state your name to the Court and jury.      A. Anton Barcott.

Q. What relation are you to John Barcott? [330]

A. I didn't get that.

Q. What relation are you to John Barcott?

A. His son. His son.

Q. How old are you?      A. How old am I?

Q. Yeah.      A. Thirty-four.

Q. And what is your business?

A. I operate the restaurant at the present time.

(Testimony of Anton Barcott.)

Q. What's the name of the restaurant?

A. The California Oyster House.

Q. Where were you born?

A. In Yugoslavia.

Q. When did you come to the United States?

A. In 1925.

Q. After you come to the United States, what did you do?

A. I went to school for about a year and a half, and in the meantime I was working at the restaurant.

Q. What restaurant?

A. The California Oyster House.

Q. For whom?           A. My father.

Q. And after a year and a half, what did you do next? What did you do next, after the year and a half? [331]

A. I quit school and went down there to work steady.

Q. And how many hours a day would you work?

A. Oh, anywhere from ten to fourteen; fifteen.

Q. And what would you do there?

A. Well, I washed dishes and peeled potatoes and helped clean, until I learned how to cook.

Q. And then when you learned how to cook what did you do?           A. I took a shift over.

Q. And when did you start to work steady in the restaurant?

A. It was around 1927 or '28, I wouldn't—couldn't exactly state the date.

(Testimony of Anton Barcott.)

Q. Did your father pay you any wage or salary for your work?

A. Not until the time I got married.

Q. And when did you get married?

A. 1934.

Q. And before '34 what did your father give you?

A. I beg your pardon, that's not right. In 1933 I got married.

Q. And before that what wage, if anything, did your father give you?

A. He gave me fifteen dollars a week when I got married.

Q. Well, before that what did he give you?

A. Oh, he gave me about—he gave me about four bits a week [332] to go to a show once in a while.

Q. And——

A. And my car fare to get back and forth to work.

Q. Was there any other member of the family working in the restaurant at that time?

A. Yes, my mother worked.

Q. And who else?           A. And my dad.

Q. Anybody else?

A. Well, brother worked for awhile until he got old enough to work.

Q. When did he come to work there?

A. Oh, I—I don't exactly know the date.

Q. How old is your last brother?

A. He's approximately twenty-three or twenty-four, I couldn't tell you.

(Testimony of Anton Barcott.)

Q. I see. And he came to work when he got old enough to work?

A. That's right. He quit school and then came to work.

Q. Did he work under the same condition that you worked?      A. Yes.

Q. Without wage?      A. That's right.

Q. Is that the custom of your people? [333]

A. Huh, I presume.

Q. Now, after you got married, you received a salary?      A. Yes.

Q. How much?      A. Fifteen dollars a week.

Q. And you worked until when?

A. Until up to the time I went into the service.

Q. And you went into the service and then—when did you come back from the service?

A. I was discharged January 3, 1946.

Q. And when did you back to work in the restaurant, if anything?

A. Oh, it was the second day after I was home.

Q. The second day.      A. Yes.

Q. And what did you do there?

A. Well, I worked for about a month and dad says to, "I promised you the place," which I have been for years, and he says, "Go ahead and take it over, you and your brother." So he turned the place over to me. So I closed the establishment down and remodeled and redecorated and made it larger.

(Testimony of Anton Barcott.)

Q. Now, during the previous year when you come back from the service, you say you went back to the restaurant [334] right away? A couple days after?

A. Yes, about two days.

Q. Was there any rationing—

Mr. Gagliardi: I am going to—

The Court: Your client is leaving the courtroom. He can't.

Mr. Gagliardi: Pardon me, your Honor. I wasn't looking, but counsel should watch it.

Q. During the months of January, February, 1946, were there any point rationing to acquire any food for the restaurant?

A. Not at that time. I think it just happened to go off.

Q. And was anything rationed at all, if anything?

A. Sugar.

Q. Just sugar.

A. Uh-huh.

Q. And prior to the time you went into the service, you was working in the restaurant?

A. Yes.

Q. Was that run on point service?

A. Yes, it was at that time. [335]

Q. You had to have what, in order to buy the food?

A. This point system that the Government had out.

Q. And what was the method—what was the condition of the menu at that time, what happened to your menu?

A. The menu and price was ceiled.

(Testimony of Anton Barcott.)

Q. Ceiled. And—what do you mean “ceiled.”

A. Well, you could not charge any more than what the—oh, it’s complicated, sometimes you try to figure——

The Court: Well, let’s not go into that——

Q. We’ll not go into that. Was it a fixed price that you must charge?      A. That’s right.

Q. You couldn’t charge any more than what the Government said.      A. That’s right.

Q. How was the condition of obtaining food for the restaurant, supplies such as meat and fish, and—

A. Well, you’d buy, the Government would allow you so many points and you bought the food according to your points.

Q. Well, was it easier or harder to get?

A. It was hard to get.

Q. Now, how was it in January and February, 1946?      A. It was a little easier.

Q. Did you have to have any point at that time?

A. No.

Q. And could you get all the meat and supply that you wanted at that time?      A. Yes.

Q. What kind of a book your father was keeping in the restaurant when he was running the restaurant?

A. The book that is in evidence at the present time.

Q. Is that the only book that he ever had?

A. That’s the only one that I ever saw.

(Testimony of Anton Barcott.)

Q. Well, would you see it if he had any other book?

A. Well, he used to keep a little book for his check accounts.

Q. Well, showing you Exhibit No. 2, A-2, is that the little book?      A. Yes.

Q. And showing you Exhibit No. 1, A-1, Defendant's Exhibit No. A-1, is that the book that he kept to record all the cash transaction and disbursement?      A. Yes, it is.

Q. How was the cash register checked and handled?

A. Well, dad took the cash out and counted it in the mornings, when he came down. He used to get up five o'clock every morning. I don't think he ever missed one morning. [337]

Q. Five o'clock every morning. And how would the slips be checked? Would they be added and compared with the cash register?

A. No, uh-uh, he never had time for that.

Q. And who handled the cash register?

A. Most everybody.

Q. And who handled the slips?

A. Every body.

Q. You mean the waiters?

A. The waitresses, yes, they would give the customer a slip and it would be put on a stub at the cash register.

Q. And your father, you say, never checked them?

A. No, never—I never seen him once check them.



(Testimony of Auton Barcott.)

Q. How did your mother and father live at home? What kind of a—where did they get their food to eat at home?

A. Well, they used to haul it from the restaurant, most of it.

Q. And how—did you have any automobile all this time? A. No, sir.

Q. Did you have any—how did they live, expensively or meagerly?

A. I'm afraid not. They lived like poor people.

Q. And how were the clothes that your father and mother buy you and your other brother and sister? [338]

A. Well, when I was younger, he used to buy himself a pair of shoes and he would give me his shoes for my Sunday best.

Q. And—

A. That's been quite a while ago; that was when I first came to this country, and four, five or six years after I was in this country he would—

Q. And what your mother would do for the clothes for the other children?

A. Well, she'd make some of them and the rest of them she'd try to scrape them up as—anywhere she could.

Mr. Gagliardi: I think that's all. You may cross-examine.

Cross-Examination

By Mr. Pomeroy:

Q. When did you enlist in the Army?

A. I enlisted in March—no, May, 1944.

(Testimony of Anton Barcott.)

Q. In May, 1944.

A. It wasn't—I beg your pardon, it wasn't in the Army, it was in the Navy.

Q. You enlisted in the Navy in May, 1944. You were away from the restaurant then about a year and a half or a little better? [339]

A. Two years lacking one month.

Q. Didn't you return in January, 1946?

A. Uh-huh.

Q. When did you leave?

A. March of—May of 1944. It was—I was in service twenty-two months to be exact.

Q. Well, March or May, it was sometime——

A. I don't—I don't know the exact date. I couldn't tell you. My discharge papers will show it.

Q. You were twelve years old when you came to this country? A. Yes, sir.

Q. In 1925? A. '25.

Q. And who were you living with until you came to this country?

A. With my grandparents.

Q. And the Internal Revenue agents were checking this restaurant when you took it over, is that correct?

A. No, not when I took it over. They were checking before.

Q. They were checking during the month of February—— A. Yes.

Q. ——when you were in there, is that correct?

A. Uh-huh.

(Testimony of Anton Barcott.)

Q. When you were making arrangements to take it over? [340] A. Yes.

Mr. Pomeroy: That's all.

Redirect Examination

By Mr. Gagliardi:

Q. You enlisted in the Navy voluntarily?

A. Yes.

Q. You was married and had children?

A. My father's consent.

Q. You were married at the time?

A. Yes.

Q. Did you have any children?

A. Yes, I had one.

Q. And your brother, when did your brother enlist? A. Yes, he volunteered also.

Q. When did he go in the service?

A. Oh, I don't know. I think he went in a year or so sooner than I did.

Mr. Gagliardi: That's all.

(Witness excused.) [341]

JOHN PLANCICH

resumed the stand as a witness on behalf of the Defendant, was examined and testified as follows:

Direct Examination

By Mr. Gagliardi:

Q. What is your name? So we get it again.

A. John Plancich.

(Testimony of John Plancich.)

Q. You were a witness here yesterday?

A. Yes, sir.

Q. I believe you say you was some secretary of the Fishermen Packing Company?

A. General Manager and Secretary.

Q. And there was introduced here in evidence a contract wherein Mr. Barcott was released of this charge from four shares of stock in the corporation. Do you recall that?

A. Yes, I recall it. I wasn't on the stand when it was introduced.

Q. Yes, you was on the stand. Who were the shareholders of that corporation, how many there were in there?

A. In the company?

Q. Yeah.

A. There is approximately, it ranges from the various years, from I think a low of ninety-two up to a hundred. [342]

Q. And when this stock was purchased, what were the condition of purchase? Were they purchased on the installment plan, or were they purchased for cash?

A. Well, most of the stock issued was issued when the company was organized in the year of 1928 and '29.

Q. Yes.

A. Stock after that, I think there was very little original issue; it was all stock transfers.

Q. And those shares of stock, the company should receive the cash?

(Testimony of John Plancich.)

A. As I recall in reviewing some of the records, some of the stock was purchased by cash, others were stock subscriptions.

Q. When the corporation was organized, it was capitalized for a fixed amount?

A. A hundred and fifty thousand, I believe.

Q. A hundred and fifty thousand dollar. And someone had to subscribe under the law for that much stock, whether it was issued or not?

Mr. Pomeroy: If the Court please, I think that calls for a legal conclusion.

Mr. Gagliardi: No, I think if he knows it.

The Court: I don't know how he could say unless he was giving expert testimony. I don't see whether [343] it is relevant or not, whatever you have in mind, Mr. Gagliardi.

Q. Well, what was the reason you were cancelling this contract with Mr. Barcott, releasing him from buying eighteen shares and only allowed him to buy fourteen shares?

A. Well, there was—he had originally, the eighteen shares, as I recall it.

Q. Yeah.

A. However, there was—when I came, entered the employment of the company in 1935, on the records of the books there was a note outstanding against John Barcott for two hundred dollars. I believe; and that agreement that's attached to the cancelled stock in there is a settlement of that note and interest thereon as stated in the note.

(Testimony of John Plancich.)

Q. Was that note for the payment of the shares of stock, or subscription of the stock?

A. That is something that I could not say. The note was—the notes were on the ledgers at the time I entered employment.

Q. Was there any other shareholder under the same condition?

A. Yes, there were quite a few. [344]

Q. Was the same cancellation took place?

A. On—in practically most of them they had turned to the point where I'll tell you—can I review it a little for——

Q. Yes.

A. ——in detail? As far as the thing was concerned, the notes were about, generally, to become outlawed, so we gave the fellows that had the notes the privilege of paying up their notes, cancelling portions of their stock in payment of the note.

Q. Was the corporation making any profit those years, paying any dividend?

A. Most of the—no, they have not.

Q. When was the first time the corporation paid any dividend?

A. The corporation did not pay any dividend from 1930 until 1940.

Mr. Gagliardi: That's all.

#### Cross-Examination

By Mr. Pomeroy:

Q. But they paid it that year that he cancelled out the four shares, did they not?

A. How's that?

(Testimony of John Plancich.)

Q. They paid a dividend about the same time that he had [345] this note cancelled and the shares cancelled, isn't that correct?

A. Well, I would have to refer to the books. I think it was after the note was cancelled.

Q. Well, the note was cancelled in May—the 28th, and June the 10th they paid a dividend, isn't that correct?

A. I couldn't say without referring to the books.

Q. Yes? What do you mean?

A. I think there are records that will vouch for themselves there, speak for themselves the date of the dividend and the date of the cancellation.

Mr. Pomeroy: May I have the one sheet. the one underneath there.

Q. What date was the note cancelled?

A. Right—according to the stock record, it was on May 25th, '40. I don't know whether the agreement is signed prior to that or not.

Q. May 25, 1940. That shows the cancellation of the note?      A. On the stock record, yeah.

Q. All right. Now, what other record do you have to have to show the dividend that's paid and when you paid it?

A. I think that was recorded there yesterday. I would have to have the minute book.

Q. The minute book? Is this the minute book?

A. No, the minute book was taken out. They took——



(Testimony of John Planchich.)

Q. Oh, it was removed. Well, let's get it. You don't recall that it was June the 10th?

A. I believe it was in June.

Mr. Pomeroy: That's all.

Mr. Gagliardi: That's all.

(Witness excused.)

### ANTON SURYAN

produced as a witness on behalf of the Defendant, after being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Gagliardi:

Q. You may state your name, please.

A. Anton Suryan.

Q. How do you spell the last name?

A. S-u-r-y-a-n.

Q. And what relation are you to John Barcott?

A. Brother-in-law. I married his sister.

Q. And did you have any agreement with him during the year [347] 1946 concerning loaning of any money?

A. Yes, sir.

Q. What was the agreement?

A. I was asking him to loan me about fifteen thousand dollars. I figure to build a boat.

Q. To build a boat? A. Yes, sir.

Q. What is your business? A. Fisherman.

Q. Fisherman. How long you been a fisherman? A. All my life.

(Testimony of Anton Suryan.)

Q. And you was going to build a boat for the purpose of fishing?       A. Yes.

The Court: What year was that?

Mr. Gagliardi: What year was—'46, your Honor.  
In 1946——

The Court: Yes.

A. No, I meant—that was 1945.

Q. Yeah, you asked him in 1945.

A. '45. Yes, sir.

Q. And when did you intend to build the boat?

A. I figure to build boat right here in Tacoma.

Q. When? What year?

A. Right in the beginning 1946.

Q. '46. And what would the boat cost you to build?

A. John Barcott asked me that it was going to cost around forty thousand dollars.

Q. It would cost around forty thousand dollars.

A. Yes, sir.

Q. And you asked Mr. Barcott to loan you around fifteen thousand.

A. Ten to fifteen thousand dollars, yes.

Mr. Gagliardi: You may cross-examine.

### Cross-Examination

By Mr. Pomeroy:

Q. When did you ask him for the loan of this money?       A. 1945.

Q. When?

A. Right after the 4th. That was sometime in September.

(Testimony of Anton Suryan.)

Q. September, 1945. A. '45, yes, sir.

Q. Did you build a boat? A. No, sir. [349]

Q. Why not?

A. I buy—I figure it was gonna cost me too much money, so I decided to buy a boat. Old boat I got now.

Q. Did you buy a boat then? A. Yes, sir.

Q. When did you buy the boat?

A. I bought it the same year.

Q. 1945? A. 1945, yes, sir.

Q. What time in 1945?

A. I don't really remember. Right after the—  
after the Christmas.

Q. Right after Christmas in 1945.

A. Yes.

Mr. Pomeroy: That's all.

### Redirect Examination

By Mr. Gagliardi:

Q. Was it '45 or '46, which was the year you took over ownership? What year did you buy the boat? What year did you buy the boat?

A. 1945.

Q. How many years ago was that? [350]

A. Pardon me, 1946, the beginning.

Q. Yeah, that's what I'm trying to get.

A. Yeah.

Q. And what month of the year did you buy?

A. That was in February.

Q. And how many years ago was that year that you bought the boat?

(Testimony of Anton Suryan.)

A. Well, it's two years. We only had it two years, two seasons.

Q. Uh-huh, two season. That's all you had, two seasons with that boat? A. Yes.

Q. 19—the season of '46 and the season of '47.

A. Forty-six, forty-seven, yes, sir.

Mr. Gagliardi: That's all.

Recross-Examination

By Mr. Pomeroy:

Q. Why didn't you—why did you say “right after Christmas”? A. After—pardon me?

Q. Why did you answer the question, “right after Christmas”?

A. Well, I answer right after Christmas, that's when we had the boat, right after Christmas.

Q. That's February, is it? [351] A. Yes.

Mr. Pomeroy: That's all.

Mr. Gagliardi: That's all.

(Witness excused.)

MRS. PEARL McCORD

produced as a witness on behalf of Defendant, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gagliardi:

Q. You may state your name to the Court and jury, Mrs. McCord.

A. Mrs. Pearl McCord.

(Testimony of Mrs. Pearl McCord.)

Q. Pearl McCord? Where do you live?

A. 812 South Junett, Tacoma, Washington.

Mr. Pomeroy: I didn't get it.

The Witness: 812 South Junett, Tacoma, Washington.

Mr. Pomeroy: How do you spell that?

The Witness: J-u-n-e-t-t. [352]

Q. And your—do you have a family?

A. Yes, I do.

Q. How many children have you?

A. I have one now.

Q. How many children had you?

A. Pardon?

Q. How many children did you have?

A. Two

Q. You say—what happened to the other?

A. He was killed in the war.

Q. What business are you in? What do you do for a living? A. Pardon?

Q. What do you do for a living?

A. I'm a waitress at the California Oyster House.

Q. You work in the California Oyster House. How long you been working there?

A. Since 1929.

Q. In what capacity? A. Waitress.

Q. Are you still working there now?

A. Yes, sir.

Q. Who else—was Mrs. Barcott working at the California Oyster House at the time you went to work there?

A. When I first went to work there, yes. [353]

(Testimony of Mrs. Pearl McCord.)

Q. And how long did she work there?

A. I wouldn't state the exact number of years because I don't remember.

Q. Approximately, eight or ten years?

A. I would say that would be right.

Q. And what was she doing over there, Mrs. McCord?

A. She was a waitress when I was there.

Q. What else would she do?

A. Clean and whatever was to be done after the place was closed.

Q. Well, what shift did she take care of?

A. The night shift, with me.

Q. And the California Oyster House—anybody else in the family of Mr. Barcott work there?

A. Anton Barcott and Johnny Barcott.

Q. All work there? A. Yes.

Q. Now, you're—been there since 1928?

A. '29.

Q. '29. That's something like eighteen years?

A. About that.

Q. And during the time that you worked there who handled the cash register?

A. Whoever was nearest the cash register. [354]

Q. And would Mr. Barcott ever check the slips?

A. Not to my knowledge, no.

Q. Did you ever see him check anything?

A. No.

Q. Now, in regard to tips, did you receive tips from that restaurant? A. Pardon?

(Testimony of Mrs. Pearl McCord.)

Q. Did you get any tips as a waitress in that restaurant? A. Yes.

Q. Did Mrs. Barcott get tips?

A. Well, I presume. I never checked on my fellow-workers.

Q. What was your average tip that you received per day, the average amount?

A. That would be very hard to say. They varied.

Q. But, what would be the smallest and the biggest?

A. I would state the exact number. I don't remember over that period of years.

Q. Well, give us an approximate amount, please.

A. Well, that's hard to say, I can't——

Q. Would you say five dollars was the least or the most?

A. ——remember eighteen years back what I received in tips.

Q. No, no, not eighteen years. I mean between——

Mr. Pomeroy: Well, I'll object to this, if the Court please. She's a willing witness, she's [355] answered three or four times, and while he's giving the figures to her——

The Court: I think, of course, if she could make an estimate, that would be helpful.

Mr. Gagliardi: Evidently she misunderstood the question.

Q. I didn't mean in just 1928 and '29; I mean the period of time you've been there, what's the average daily——

A. Well, are you referring to the three years, or before?

(Testimony of Mrs. Pearl McCord.)

Mr. Pomeroy: I'll object to that—just a moment. Just a moment. I'll object to that, if the Court please, on the ground that she's been there up to the present time. She's been with Barcott since 1928 or some such date——

The Witness: '29.

Mr. Pomeroy: '29. Mrs. Barcott hasn't been there since 1938, and what her daily tips may be, an average over the period of time would not be relevant in this case.

The Court: The witness can make her estimate of what they were before 1938. [356]

Q. What were the daily tips prior to 1938?

A. My tips from the time I went until '38?

Q. Yes. Not for every year, but prior to 1938, what were the average?

A. I don't like to state figures, because——

Q. Approximately, you don't have to be exact——

Mr. Pomeroy: I'll object to that, if the Court please. She's answered that. I object to any further questioning along this line.

The Court: That was before '38.

Q. Have you any fixed amount that was the minimum that you received?

Mr. Pomeroy: If the Court please. I'll object at this time to anything since 1938, because the best evidence that you can construe——

The Court: Oh, it might have some evidentiary value. It will probably be '38, subsequent, but if she wants to make an estimate, she may. [357]



(Testimony of Mrs. Pearl McCord.)

Q. Can you give us the minimum figure that you received?

A. Well, I would say this, it's not a fact, what I mean is I wouldn't swear to it, three dollars would be low and five would be average.

Q. Average. A. That's me.

Q. For you. A. That's right.

Mr. Gagliardi: That's all.

Mr. Pomeroy: No questions.

(Witness excused.)

## ROBERT E. BIRCH

produced as a witness on behalf of the Defendant, after being first duly sworn, was examined and testified as follows:

### Direct Examination

By Mr. Gagliardi:

Q. You may state your name to the Court and jury.

A. Robert E. Birch. B-i-r-c-h. [358]

Q. Mr. Birch, what is your profession or occupation?

A. I'm a Certified Public Accountant.

Q. And where is your place of business?

A. Fidelity Building.

Q. Are you licensed by the State of Washington as such public accountant?

A. Yes, I have a C.P.A. license in the state.

(Testimony of Robert E. Birch.)

Q. At the request of Mr. Barcott did you make an audit, or a—an auditing of his assets?

A. Yes, I made an examination of them.

Q. Made an examination of all of the assets and also—will you please present the statement that you made? When did you make this auditing and make the report, Mr. Birch?

A. Well, we've been doing this work for about a week now.

Q. This last week?

A. Yes, that report was made——

The Clerk: Defendant's Exhibit A-3, for identification.

Q. Showing you Defendant's Exhibit A-3, for identification, I ask you if you made auditing of Mr. Barcott's assets and liabilities and for what year. What year did that cover?

A. This report covers the years 1919 through 1945. [359]

Q. Inclusive? A. Inclusive.

Q. And this report, where did you get your source of information?

A. If I may read from this report here——

Q. No, you have to testify.

A. We verified various bank deposits; in other words, savings accounts at the various banks and Saving and Loan Association; we examined the bonds listed according to serial numbers, date of purchase, and so forth; some of the information was obtained from Mr. Barcott in regard to his real estate and other information; as for the dates purchased, we didn't examine those.

(Testimony of Robert E. Birch.)

Q. And information as to the original capital, where did you get that information?

A. From Mr. Barcott.

Q. And information concerning additional asset acquired during the period, where did you get that information?

A. From Mr. Barcott.

Q. And did you examine any other sources upon which you may arrive the maximum income that Mr. Barcott would have received during the period of 1919 to 1945, both date inclusive, in which he had to pay no income tax, or if he did pay an income tax, what amount of income [360] tax did he pay?

A. Well, we examined his book, cash book there, for the years, well, the complete years of '44 and '45 that you have in exhibit there.

Q. Just a minute.

Mr. Gagliardi: If your Honor please, may I ask, the defendant has to leave and he can't hold himself any longer, I ask the Court's indulgence.

The Court: How many more witnesses do you have?

Mr. Gagliardi: I have just two more, your Honor. We can't finish tonight. I'm sure.

The Court: Have you any other witnesses?

Mr. Gagliardi: We have this gentleman here, and another witness—and then there is the character witness, so we couldn't finish it tonight.

The Court: Three of them?

Mr. Ursich: If your Honor please, if you wish them tonight, I'll have to call them right now.

(Testimony of Robert E. Birch.)

The Court: Well, it is after adjourning time, but you desire to adjourn? [361]

Mr. Gagliardi: It is only ten minutes.

The Court: How long will it take for this witness?

Mr. Gagliardi: This is an accountant to go into these figures of twenty-five or twenty-seven years.

The Court: I told the jurors that I did not expect to keep them at work on Saturday, and I am rather anxious to make good on my word, but there is a case set for Monday, a non-jury case. I think I shall have to continue that case over until Tuesday, because if we work tomorrow you would have to work rather late to complete this case with the argument and the Court's charge, and so I think I shall adjourn this case over until Monday morning and allow the jurors to go home and report back here on Monday.

Now then, over this long adjournment I want you to bear in mind particularly the admonitions and instructions I gave you at the outset of this case. It has gone along for two days. If you are not careful you may talk to some of the people at home about the case. That you must not do. They may ask you to—what kind of a case you are on. You can say you are on an income tax case, but beyond that you should not go. Do [362] not express any opinion and do not allow anybody to express an opinion to you, and then we can be sure that your verdict will reflect one in keeping with the law. Now, you are excused.

(Whereupon, adjournment was taken until 10:00 o'clock a.m., November 3, 1947.)

November 3, 1947, 10:35 o'Clock A.M.

The Court: You may proceed now.

Mr. Gagliardi: If it please your Honor, the last witness we had on the witness stand was Mr. Birch, the Certified Public Accountant. We hadn't gone very far with him. I have a few short witnesses that I would like to call first and dismiss them, and then we will proceed with the accountant, which will take a little longer time, if your Honor will permit me to call them out of order.

The Court: Are there any objections?

Mr. Pomeroy: No objections.

The Court: Proceed:

### MARIE DASCHER

produced as a witness on behalf of the Defendant, after being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Ursich:

Q. Will you state your name to the Court and jury, please? A. Marie Dascher. [364]

Q. How do you spell that last name?

A. D-a-s-c-h-e-r.

Q. Where do you live, Mrs. Dascher?

A. 3626 South Monroe.

(Testimony of Marie Dascher.)

Q. I'll ask you whether or not you were ever employed by John Barcott at the California Oyster House?      A. Yes, I was.

Q. When did you go to work there?

A. The first part of '28 till the first part of '31.

Q. First part of 1928——      A. Yes.

Q. ——till the first part of '31. In what capacity were you employed there?      A. A waitress.

Q. As a waitress?      A. Uh-huh.

Q. During the time that you were employed there, do you know of your own knowledge whether or not Mrs. Barcott was employed there?

A. Yes, I remember very distinctly, because at that particular time I was working at another establishment and Mr. Barcott came over and asked me if I would work for him—come and work for him. He said that I would better myself as I would be more than doubling my wages in tips, and——

Q. Go ahead.      A. That's all.

Q. So you did go to work for Mr. Barcott?

A. So I gave it a thought and then finally decided to go. He told me his wife was working there and that's why he knew that. So I did work there, and I was working with Mrs. Barcott.

Q. Do you have any recollection about how much you received in tips during that time?

A. Well, when I first went there, I was working on the morning shift and Mrs. Barcott was working on the night. And I was making from four to five on the day shift. Then, we alternated, every two weeks we would alternate. I would take the

(Testimony of Marie Dascher.)

night shift, which was Mrs. Barcott's at that particular time. Then I was making from seven, sometimes ten, and I have made the week-ends on twelve——

Q. As——

A. Uh-huh, but on the night shift.

Q. Would you say then that you are able to express an opinion that seven dollars would be a fair average that you received daily?

A. I think so. I think it was pretty good there.

Q. And [366]——

A. It was pretty good, I thought.

Q. ——all during that time that you worked there, Mrs. Barcott was employed?

A. Yes, then she would do other work besides, if she wasn't working.

Q. She'd do other work?           A. Yes.

Q. Like janitor work?

A. Janitor—I've seen her mop many times.

Q. How did the tips in the California Oyster House compare with the previous restaurant you were working in?

A. Well, where—the place I left, I wasn't making more than a dollar a day, and when I heard that, that was kind of attractive to me because I had—I was a widow and I had two children and it meant that I didn't have to worry about existing after I went over there. That's how I remember so distinctly.

Q. There actually was that difference?

A. Yes, there was.



(Testimony of Marie Dascher.)

Cross-Examination

By Mr. Pomeroy:

Q. Mrs. Dascher, you have known Mrs. Barcott and Mr. Barcott for about twenty years, isn't that right? [367]

A. '28 was the first—1928.

Q. And you've seen them during those periods, the last twenty years?

A. Oh, yes, I've been in there off and on, all the time.

Q. You were quite friendly with them?

A. Well, I—I've known them and always been friendly, even though I haven't worked there.

Q. You have always been friendly with them.

A. Always been friendly, I never visit them to a great extent.

Q. Now, Mrs. Dascher, what work was Mrs. Barcott doing during this period of time that you were in there?

A. Well, she—as I said, she relieved the girls and would do a lot of janitor work in the back. I can remember that.

Q. Did she do any cooking?

A. And she really——

Q. Did she do any cooking?

A. Well, I couldn't say about that.

Q. You don't remember.

A. Of course. I wasn't there continually, you know.



(Testimony of Marie Dascher.)

Q. You don't remember that.

A. No, I can't remember that, no.

Q. Would you say—— [368]

A. I couldn't say "yes" or "no."

Q. Would you say that she didn't do any cooking?  
A. Well, I couldn't say.

Q. You don't remember. Was she there all during the time that you were there?

A. Yes, quite, very—very much so.

Q. Did she go away on any trips while you were there?  
A. No, not that I know of.

Q. Did she go to Europe for a trip?

A. Not that I——

Q. You don't know if she ever went or not?

A. I don't know anything about it.

Q. You don't know if she——

A. No, I was gone. I was in California.

Q. Oh, is that so? When did you leave?

A. Oh, I left in the latter part of '31. I was down there for fourteen——

Q. That was when you quit the California Oyster House, was when you went there?

A. Yes, that's when I went to California.

Q. And how long were you in California.

A. Fourteen months.

Q. And then did you come back to Tacoma?

A. Yes, I—I came back to run a place of my own. [369]

Q. Oh, I see.

A. And—but that wasn't in town.

(Testimony of Marie Dascher.)

Q. And did you run a place of your own?

A. Well, with another woman, on the Gig Harbor Ferry.

Q. You worked on the Gig Harbor Ferry. And how long were you employed there?

A. Two years.

Q. Then where did you work?

A. Well, I—oh, I had a little grocery store of my own. I went on my own after that, more or less.

Q. How much did you earn on the Gig Harbor Ferry?

Mr. Ursich: I submit, your Honor, that's improper. It has no basis of comparison.

The Court: Objection will be overruled.

A. Oh, I—I was in partnership with this woman.

Q. How much did you earn while you were on the Gig Harbor Ferry?

A. Oh, I couldn't say exactly.

Q. Did you earn fifteen dollars a day?

A. Oh, no, to begin with there was two of us and we would split it, I wouldn't know exactly, it may be more than that.

Q. What did you do in California when you were down there fourteen months? [370]

A. Oh, I was—didn't do anything for about six months, and then I was clerking down there.

Q. What was the reason for you leaving the job at the California Oyster House?

A. Because I—oh, I wanted to go down to my mother's sister in California.

Mr. Ursich: I object—

A. I wanted to go down there.

(Testimony of Marie Dascher.)

Q. You wanted to go down and visit your mother's sister?

A. Well, I wanted to go down there and move, really.

Q. You wanted to go down there and move?

A. Uh-huh.

Q. Did you work in California?

A. Yes, I worked after——

Q. As a waitress?

A. No, I didn't work as a waitress down there.

Q. You didn't work as a waitress.

A. Just clerked here and there.

Q. How much salary were you getting from Mr. Barcott when you worked there?

A. Three dollars.

Q. Three dollars a day? And about seven dollars—— A. That was——

Q. That's ten dollars a day all together you earned, is [371] that right? A. Well, yes——

Q. You earned ten dollars a day all the time you were there?

A. Yes. Well, I figured—that is an average. I figure maybe it would run about that.

Q. Well, an average of ten dollars a day.

A. Yes, yes.

Q. And how many days a week did you work?

A. Oh, some five—five days a week, that is, I'd work overtime, too, when some of the other girls wouldn't work. That's why that averaged that way.

(Testimony of Marie Dascher.)

Q. Oh, you worked overtime.

A. Well, when somebody else didn't show up, or something like that.

Q. How many days a week did you work?

A. Five or six.

Q. Five or six, which was it?

A. Five and six, both.

Q. And you were making about sixty dollars a week?

A. Well, of course I couldn't remember exactly how——

Q. Well, isn't that your testimony here?

A. Yes, yes, yes, yes, that's it. I say, if I was working, sure. [372]

Q. Some days you made fifteen or twenty dollars, is that right? A. Oh, no, not twenty dollars.

Q. Fifteen dollars?

A. Oh, I said I made three, and then I'd make in the day shift I'd make four, five and six; and then at the night shift I would alternate every two weeks, it would be a couple of dollars more, that is, off and on.

Q. Didn't you testify that you got as high as twelve dollars a day in tips?

A. I did—that would be once in a while, I said.

Q. And then on that day, with your three dollars salary, you'd make fifteen dollars a day.

A. Yes, but that wasn't all the time, but it was—on a week-end, like on a Saturday perhaps.

(Testimony of Marie Dascher.)

Q. And you were very grateful for this job, as you say, because Mr. Barcott gave you a chance to support your children.

A. Yes. That did help me out, because I was a widow and I had my two children and it helped me to exist.

Q. But sixty dollars a week, and then you quit and went to California.

A. Yes, I lost my boy after that and I was upset and I went away.

Q. When did you lose your boy, Mrs. Dascher?

A. Oh,—

Mr. Ursich: I object, if your Honor—that's immaterial.

The Court: Objection is overruled.

A. Well, I lost my boy in the last part of '29.

Q. The last part of '29, but you stayed on about two years more.

A. Yeah, but I went to—yes, I did. My mother moved away, so I went down there after her.

Q. So you were making sixty dollars a week and then you quit and went to California.

A. Well, yes, I don't know whether I was making sixty, or somewheres around, pretty good anyway. I couldn't say definitely.

Mr. Pomeroy: That's all.

Mr. Ursich: That's all, Mrs.—

(Witness excused.) [374]

ROBERT B. KNEGO

produced as a witness on behalf of the Defendant, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ursich:

Q. Will you state your name, please?

A. Robert B. Knego.

Q. Where do you live, Mr. Knego?

A. 3637 South Ainsworth.

Q. What is your business, Mr. Knego?

A. I have no business, I am a cook by trade.

Q. You are a cook by trade. A. Yes, sir.

Q. You are not working now?

A. Not at the present time.

Q. Calling your attention to on or about the 22nd day of January, 1945, I'll ask you whether or not you borrowed any money from John Barcott?

A. 1945?

Q. Yes.

A. There must be some mistake, because it was '43.

Q. 1943? A. Correct.

Q. And what was that for? [375]

A. Well, my wife got—in the hospital and I was forced to get out of home, and I went to Mr. Barcott and asked him if he lend me from five to seven hundred dollars. I had a little money of my own, and I went to work for the Air Force, Pacific Oversea Air Force, and I was making a little money and I had a few bonds and I cashed in, and

(Testimony of Robert B. Knego.)

Mr. Barcott say, "Sure, I'll let you have the five hundred or seven hundred dollars, whatever you want."

Q. And did he lend you the money?

A. Yes sir.

Q. Did you give him any security for that money?

A. No sir, he took the mortgage on the property till I paid him up.

Q. He took the mortgage on the property.

A. Yes sir.

Q. And did you finally pay him?

A. Everything's paid off and property is turned over to me.

Q. When did you pay him, do you remember?

A. I think it was 1945 or something like that, I paid it all up, and——

Q. You paid him all up.

A. All—paid him all up.

Q. Did he—you were the owner of Lots 19 and 20 in Block 8633, is that the property? [376]

A. That's the property.

Q. That's the property you gave a mortgage to him for? A. Yes sir.

Q. Did you ever pay him any interest on that loan? A. No sir.

Q. Or anything——

A. I asked him if he want it, and he said he didn't want it, so I didn't pay him nothing.

Q. In other words, you paid him the loan back——

(Testimony of Robert B. Knego.)

A. I paid him all the loan, but then I asked him if he wants any interest on it he refused it, so I didn't pay him any.

Q. Then he cleared the title to your——

A. Cleared the title, and I went to court and cleared everything on my name.

Q. And that was all there was to it.

A. That's all there was to it.

Mr. Ursich: That's all.

Cross-Examination

By Mr. Pomeroy:

Q. Who is Edward L. Pallies?

A. Pallies? That's the man that used to own the property. [377]

Q. Did he own it before you did?

A. Yes sir.

Q. Well, he's the one that gave the deed to Mr. Barcott, didn't he?

A. Well, his widow give him the deed, because he died before, so there was probaton going you know, they had some kids and it had to be probated, so it took quite a time till it was probated, and my attorney had it all fixed up and we both, we—Mr. Barcott paid the money for it and then after I paid him, then the property was turned over to me.

Q. Oh, I see. You were buying it from Pallies, and then——

A. Yeah, that's it.

Q. ——you borrowed some money from Barcott and Pallies gave the deed to Barcott, and then when you paid him Barcott gave you the deed.



(Testimony of Robert B. Knego.)

A. Correct.

Q. How much money did you borrow?

A. Well, between five or seven hundred dollars, I'm not——

Q. Between five and seven hundred dollars, and how much——

A. Yes.

Q. ——how much did you pay him back?

A. Paid him the same amount as much as I borrowed.

Q. How much does this paper say 'you paid him? [378]

A. Oh, I don't see very good. Wait till I get my glasses. Oh, what does that say? One thousand dollars.

Mr. Pomeroy: That's all.

A. That's include,— I give Barcott some money before—before I——

Mr. Pomeroy: That's all.

A. ——before it was——

Mr. Ursich: Oh, let him answer. Let him explain.

Mr. Pomeroy: You can ask him a question if you want. He answered me.

### Redirect Examination

By Mr. Ursich:

Q. Did you pay him a thousand dollars, Mr. Knego?

A. Paid him a thousand dollars—I give him a, I think it was five or six or whatever it was, what

(Testimony of Robert B. Knego.)

money I had when I cashed in the bonds and what little cash I had——

Q. Uh-huhm.

A. ——then I give it to him and Mr. Barcott say when the deed and everything is set up in the court, he says, “You let the attorney come down there” and I give him the cash, he says, “You ain’t got no time, let him come down here,” [379] and I give him the money and everything was okeh then.

Q. Well, was it a thousand dollars, or do you remember?

A. That’s all the property was worth, a thousand dollars.

Q. Well, what I want to know is this then, did you give Mr. Barcott any premium for the use of his money at all?

A. Did I give him any premium?

Q. Any interest or anything like that.

A. No sir, no interest whatever I give.

Q. In other words, you gave him back the same amount he gave you?

A. Same amount that he gave me.

Mr. Ursieh: That’s all.

Mr. Pomeroy: That’s all.

(Witness excused.)

## ROBERT E. BIRCH

resumed the stand for further examination and testified as follows:

## Direct Examination

By Mr. Gagliardi:

Q. Mr. Birch, I believe we were examining you when we stopped Friday afternoon, if you recall, you was—showing you Defendant identification A-3, I ask you if that's the report, financial report that you prepared [380] for Mr. Barcott?

A. That's correct.

Q. Mr. Birch, in preparing that financial report, from what dates did you begin to find the assets and the earning of Mr. Barcott, what period of time did that cover?

A. We started with the years 1919 through 1945.

Q. And during that time, did you itemize the asset of Mr. Barcott from year to year?

A. That is correct.

Q. And did you then itemize and calculate the earning of Mr. Barcott from year to year?

A. That is correct.

Q. What basis did you have to ascertain the earning of Mr. Barcott from year to year, what basis did you use, what method?

A. Well, we went on the basis that he could have earned a maximum amount allowable under income tax laws without paying any income tax for certain years. The years that he did pay the tax, we added the amount of tax, we figured the income on that and added that to that.

(Testimony of Robert E. Birch.)

Q. You have examined the law and also the records concerning the maximum amount a person could earn during each year between 1919 to 1945, inclusive, in which he had no tax to pay? [381]

A. Yes, we got a list from the Collector's office in Tacoma.

Q. And from that then, did you start in, in preparing the assets of Mr. Barcott from year to year?

A. That is correct.

Q. In ascertaining the value of his asset, did you then total from time to time?

A. That's right.

Q. Now starting with the year 1919, you start—that's the first year you start on this report, on page three of the report—page two, or page three, which is it?

A. Exhibit 2 concerns the earning by the business and so forth.

Q. And page number three, which you marked exhibit three, but it's page number three, as a matter of fact, that starts with what?

A. Exhibit three starts out with his living expenses for the various years, and we determined his non-deductible expenses.

Q. Now, in starting the business in 1919, what capital did you take into consideration that Mr. Barcott had when he started out in business?

A. Five thousand dollars.

Q. And did you carry that capital as a capital asset in the [382] beginning of the business?

A. Yes, we carried that until 1926, when an additional fifteen hundred dollars was added into that.

(Testimony of Robert E. Birch.)

Q. And in 19——

Mr. Pomeroy: Pardon me, are you still talking about Exhibit No. 3?

Mr. Gagliardi: I am talking about identification number two, and I am talking about exhibit number 1. It starts from one. I want to get to three, afterwards.

Q. In taking the capital investment, or the capital asset of Mr. Barcott, he had at the beginning of the period in 1919, you say—did you calculate was five thousand dollars? A. That's right.

Q. Anything was added to that capital in the year—any later years?

A. In 1926 there was an additional fifteen hundred dollars added.

Q. Where that fifteen hundred dollars was derived from?

A. That was the additional amount that he paid to buy out his partner.

Q. To buy out his partner. Now, did you then add anything more in a later year, concerning other sources of capital, that was not earned in the business? [383]

A. What do you mean by that, please?

Q. Any additional money that come into the possession of Mr. and Mrs. Barcott.

A. Yes, there was—there was twenty-five hundred dollars from accident proceeds. That was in 1931, I believe it was counted as additional capital.

Q. 1931 was twenty-five hundred dollars, the proceed of the death of Mrs. Barcott mother.

A. That is correct.

(Testimony of Robert E. Birch.)

Q. Did you take any other capital asset other than the earning of the business, or the possible earning of the business?

A. We took Mrs. Barcott's earnings.

Q. Your—we come to that, Mr. Birch. I want—under—if you know—did you take in consideration in figuring this statement whether or not Mrs. Barcott had any money of her own when she married Mr. Barcott? A. No, we did not.

Q. And did Mr. Barcott—did Mrs. Barcott have six thousand dollars when she married Mr. Barcott, that is not included in this report?

A. No, it is not included in this report?

Q. And then the total asset of Mr. Barcott and Mrs. Barcott at the end of the period would be six thousand dollar [384] more than you actually calculated, is that true?

A. There could be assumed there was six thousand dollars more.

Q. Now, beginning from the year 1919, what earning did you allocate Mr. Barcott earned that year? A. 1919?

Q. Yes.

A. We assumed he earned a thousand dollars.

Q. Was that the maximum that he could earn without paying any income tax? A. Yes.

Q. And what did you allocate as his living expenses? At that time he was not married.

A. Seven hundred and fifty dollars.

Q. And what did you leave as the net proceed of his business?

(Testimony of Robert E. Birch.)

A. The net was two hundred and fifty dollars.

Q. What page are you using now, sir—two, three, or one?—or what you call it.

A. This is on exhibit two.

Q. Exhibit two. And what earning did you then assume that Mr. Barcott had for the years 1920 and each year thereafter, until 1945?

A. Well, the earnings by the business, I have first, was [385] 1920, thirty-two hundred dollars; 1921, fifty-six hundred; 1922, eight thousand; 1923, ten thousand, four hundred; and 1924, thirteen thousand, two hundred; '25, seventeen thousand, nine hundred; 1926—

Q. Well, you mean those are added together?

A. That's right, this is cumulative.

Q. Accumulative.

A. No, I didn't have them as individuals, no.

Q. Yeah. Well, then, each year you added—what did you add to the beginning of the period? Each year.

A. What do you mean by each year?

Q. Well, the total accumulated increase, what did you add to it? The amount which was exempt from taxation?

A. Well, we added in there the—well, for example now, in 1921, the total accumulated earnings in the business was fifty-six hundred.

Q. What period did that cover?

A. Well, that was for 1919 to 1921.

Q. Well, then you add each year a certain amount, is that it? A. That's right.



(Testimony of Robert E. Birch.)

Q. And this amount that you add, what was it? That's the maximum amount that would be allowed by law without taxes? [386] A. That's right.

Q. Yeah. Have you figured year by year how much each year he should have earned, without adding to the total amount? I don't know whether I make myself clear or not.

A. In other words, you want to know what the maximum amount was that he could have earned without paying any income tax on it.

Q. Yes, for each year. A. That's right.

Q. Per year.

A. Yes, I have this in a schedule here, in my work papers.

Q. You have the schedule, and is that the amount which you add to the total each year?

A. That is correct.

Q. So then, this statement that you have prepared carries the amount which was allowed to be exempt from law. A. That's right.

Q. And those years he paid the taxes, did you figure the amount of tax that he paid, and did you figure the amount that he earned that year?

A. That's right.

Q. Now, each of these year, you have you say, accumulative, accumulating from year to year. [387]

A. That's right.

Q. What was the total earning of Mr. Barcott's business from January 1st, from 1919 to January 1st of 1946, the total amount of earning on the business alone? Without the investment.



(Testimony of Robert E. Birch.)

A. It could have been a hundred and thirty thousand, two thirty-seven, fifty-three.

Q. And what was Mrs. Barcott, assuming that Mrs. Barcott received, did you now in this statement figure the earning of Mrs. Barcott as tips she received? A. That's right.

Q. And what period did you cover on these tips?

A. That was from the years 1920 through 1935, a total of sixteen years we took into consideration.

Q. And that is '35, inclusive?

A. That's right.

Q. If Mrs. Barcott then stopped working in the restaurant in 1938, there would be three additional year to add to that? Would it?

A. Through '38, it would be three additional years added to that.

Q. What was the amount of Mrs. Barcott earning during that period, of you say twenty years, or nineteen years?

A. We took it on a basis of sixteen years. [388]

Q. Sixteen years.

A. There has been a total of thirty-six thousand dollars.

Q. And what was the total amount then, between the two earning, the earning of the business and Mrs. Barcott as her own individual tips, without considering any wages she was paid?

A. For the full time 1919 through——

Q. Yeah. A. ——1945?

Q. Yes.

A. That would be a hundred and sixty-six thou-

(Testimony of Robert E. Birch.)

sand, two hundred and thirty-seven dollars and fifty-three cents.

Q. Now, in figuring that amount then, did you add the original investment which Mr. Barcott had when he started business and the additional twenty-five hundred dollars which he put in when Mrs. Barcott mother was killed?

A. Added that to what?

Q. To the earning of the business and the earning of Mrs. Barcott. What was the total amount which Mr. Barcott handled during that period? How much was it?

A. It would be a hundred and seventy-three thousand, seven hundred and thirty-seven, fifty-three. [389]

Q. Now, going back to their living expenses, have you calculated the living expenses of Mr. and Mrs. Barcott during that period?

A. That is correct.

Q. Have you set it out by year, and where can we find it in this report? A. Well——

Q. What page?

A. On exhibit two—exhibit three. it gives the living expenses by years.

Q. Now, will you allow us—tell the jury what living expenses you allowed Mr. Barcott when he was unmarried.

A. Seven hundred and fifty dollars a year.

Q. And you took that out from the thousand dollar which you assumed that he earned?

A. That's right.

(Testimony of Robert E. Birch.)

Q. And what living expenses did you allow then up to the time when Mr. Barcott got married? The same amount? A. That's right.

Q. And what living expenses did you incur in 1922, the first year that Mr. and Mrs. Barcott were legally married? A. A thousand dollars.

Q. And what did you allow in 1923? [390]

A. Fifteen hundred dollars.

Q. And what did you allow each year thereafter, until 1930?

A. Fifteen hundred dollars a year.

Q. And what did you allow in 1931?

A. Three thousand dollars.

Q. Three thousand dollars for 1931.

A. That is correct.

Q. What was the extra amount in 1931?

A. That was the trip to Europe. We figure on a basis of about fifteen hundred dollars was spent.

Q. That was the trip they took to Europe, and you allowed then—— A. That's right.

Q. ——the three thousand dollars. And what expenses did you allow then for 1932 to 1941—'40, inclusive?

A. 1932 through 1940. It was twelve hundred dollars.

Q. Huh? A. Twelve hundred dollars.

Q. And then from 1941 to 1945, what did you allow in 1941? A. Twelve hundred dollars.

Q. And why is the amount here is more than twelve hundred? I see here it is fourteen hundred and thirty-five, eighty-two. What did that include?

(Testimony of Robert E. Birch.)

A. Well, there was some taxes involved, and that was some addition amount that was added in. In other words, those were non-deductible cash expenses.

Q. Non-deductible, and that was the income tax that was paid.

A. That is correct.

Q. Then those two amounts represent, if I understand you right, the allowance you allow them for living expenses and then what tax they paid.

A. That's correct.

Q. But as living expenses, you figure there were only twelve hundred dollars.

A. That is correct.

Q. Now I see here in 1942 you allow five thousand, three hundred and ninety-one, fifty-four. Out of that is twelve hundred dollars for expenses, the other is tax?

A. No, that five thousand three ninety-one, fifty-four represents the increase in net worth. In other words,—

Q. Oh, I got the wrong page.

A. Well, that's on exhibit two, but your in—

Q. Yeah.

A. —column there.

Q. Now in 1942 it was two thousand, five hundred and ninety-one. [392]

A. That's correct.

Q. Yeah, and then in 1943 it was nineteen hundred and eighty-four and some cents.

A. That's correct.

(Testimony of Robert E. Birch.)

Q. So the difference in 1945 was four thousand, eight hundred and sixty-six.

A. In 1945 it was four thousand, eight hundred and sixty-six, seventy-two.

Q. And that year, in the same exhibit, is showing the amount of tax paid for each year.

A. That is correct.

Q. Now, in 1940 there is an item here of five thousand, five hundred and twenty-one dollars and sixty-eight cents. What that represent?

A. Well, the majority of that represents capital expenses, or an expenditure that was charged off to expense during the year that should have been capitalized as depreciated.

Q. What was the expenditure? What purpose was it?

A. Oh, I believe it was for remodeling of the restaurant and so forth.

Q. And you say it was improperly charged off——

A. Well, at that time, I understand, it was charged directly on to expense.

Q. And it should not have been charged off as expense. [393]

A. No——

Q. It were a capital investment?

A. Well, it was added to his fixed assets that he had there, but it should have been depreciated over a period of so many years.

Q. I see. Instead of taking it all in one year.

A. That is correct.

Q. Well, did you examine the report of 1945——

(Testimony of Robert E. Birch.)

'40, of Mr. Barcott? Have you examined his report, as to whether or not he deducted that as an expense?

A. I saw a copy of the tax filed by another accountant—certified public accountant.

Q. And that shows it was deducted as expenses. Now, will you tell the jury, Mr. Birch, what was Mr. Barcott—strike that, please.

In adding up his assets, did you examine his holding, what asset he has?

A. Well, we examined the bank—we obtained a list of the time of certificate of deposits the bank had, the National Bank of Washington, for the years 1937 through 1943; we examined his U. S. Savings Bonds, series D, E, and G; we went down to his safe deposit box, we hadn't examined that, and obtained the amounts to the issue dates of the various years. Those were for the years [394] 1940 through 1945. His U. S. Bonds, series B, the information was obtained from a tax file of another firm of accountants here in town. We examined the savings account at the Pacific First Federal Savings and Loan. That ran from 1930 through 1945. The Alpha Corporation was from 1935 to 1945. The savings account at the National Bank of Washington was examined, that was from 1937 to 1945. The savings account at the Tacoma Savings and Loan Association was examined from 1927—I believe that was closed out in 1931. The boat "Ranger," the cost of that was obtained from Mr. Barcott. The real estate contract, that was for his son Anton, was

(Testimony of Robert E. Birch.)

examined, that was for the years 1937 to 1945. Conditional sales contract with his son Anton was examined from 1937 through 1945. The investment in the California Oyster House, the information was obtained from Mr. Barcott.

His residence cost was determined in 1926 come nearly being thirty-three hundred dollars. He paid premiums on his insurance policies——

Q. That is life insurance policies?

A. That is correct.

Q. How much was the premium?

A. Well, we took the premium of two hundred and sixty dollars [395] a year, is what was given to us. I understand it might have been two thirty, but the small amount of difference there, doesn't amount to too much. The Fisherman Packing Corporation stock, that was given to us at fourteen hundred dollars.

Q. Now in determining then, each year, what Mr. Barcott had as asset, what page do we find in this report? Where are they listed?

A. Where he had a total asset——

Q. Yes.

A. ——each year? That would be on exhibit one.

Q. Exhibit one of the identification A-3. Will you tell the jury how the asset either changed or increased during that period. How do they find it in this report? If they examined it themselves. Explain it to them.

A. Well, in 1919—do you want his net worth or just——



(Testimony of Robert E. Birch.)

Q. Yeah, the net worth each year.

A. All right. In 1919 the net worth increased two hundred and fifty dollars. In 1920, it increased thirty-seven hundred dollars, that's over 1919.

Q. In that increase does that take in consideration the tips of Mrs. Barcott, or does it not, which?

A. In 1920?

Q. Yeah. 1921, and 1920.

A. Yes, it starts with 1920, it does take into consideration. [396]

Q. In consideration. All right, go ahead now.

A. In 1921 the increase was thirty-nine hundred; in 1922 it was thirty-six fifty—this is year by year, not cumulative.

Q. Yeah, year by year.

A. In 1923 it was thirty-one fifty; 1924 it was thirty-five fifty; and 1925 it was fifty-four fifty; '26, '27 and '28 it was all the same; 1929 it increased to seventy-eight fifty-one, ninety-three; 1930 it was fifty-four fifty.

Q. In 1929, was that the year that he paid a tax?

A. That is correct.

Q. And that you take the amount from his record? A. That was included.

Q. The amount that he paid on taxes.

A. That's right. In 1930 it was fifty-four fifty; '31 it was six thousand fifty dollars; and in 1932 it was forty-three fifty; and '33 and '34 and '35 it was the same; '36 was twenty-five thirteen, seventy-five; in '37 there was a loss of eight 0 eight, eighty-one—



(Testimony of Robert E. Birch.)

Q. What was the loss?

A. Well, the loss was more or less the loss of his boat sale.

Q. Of his boat sale. A. That's right. [397]

Q. How much was the loss on that boat sale?

A. That was figured at three thousand dollars.

Q. Three thousand dollars. Go ahead.

A. And twenty-three forty-six, seventy-one was in '38; '39 was twenty-one hundred; and '40 it was thirty-five ninety-six; '41 was twenty-eight forty-seven, forty-nine; and '42 was fifty-two ninety-one, fifty-four; '43, eleven thousand five 0 one, thirty-two; '44, eighty-four twenty-seven, twenty-three; and '45 it was ninety-five ninety-one, twenty-three.

Q. You deducted the losses on that boat from his capital asset? A. That's correct.

Q. Now, will you give us his total net worth by year, as cumulative? Starting from 1920 to 1919 without the five thousand.

A. All right. In 1919 it was fifty-two fifty—these are consecutive years, I won't read the years——

Q. Yes.

A. Eighty-nine fifty, that's eight thousand nine hundred and fifty dollars; twelve thousand eight hundred and fifty dollars; sixteen thousand five hundred dollars; nineteen thousand six hundred and fifty dollars; twenty three thousand two hundred dollars; twenty-eight [398] thousand six hundred and fifty dollars; thirty-four thousand one hundred dollars; thirty-nine thousand five hundred and fifty

(Testimony of Robert E. Birch.)

dollars; forty-five thousand; fifty-two, eight fifty-one, ninety-three; fifty-eight, three 0 one, ninety-three; sixty-four, three fifty-one, ninety-three; sixty-eight, seven 0 one, ninety-three; seventy-three, 0 fifty-one, ninety-three; seventy-seven, four 0 one, ninety-three; eighty-one, seven fifty-one, ninety-three; eighty-four, two sixty-five, sixty-eight; eighty-three, four fifty-six, eighty-seven; eighty-five, eight 0 three, fifty-eight; eighty-seven, nine 0 three, fifty-eight; ninety-one, four ninety-four, eighteen; ninety-four, three forty-one, sixty-seven; ninety-nine seven thirty-three, twenty-one; and 1943 it was a hundred and eleven thousand, two thirty-four, fifty-three; '44 it was a hundred and nineteen, six sixty-one, seventy-six; and '45 it was a hundred and twenty-nine thousand two hundred and fifty-two dollars and ninety-nine cents.

Q. What was it at the end of the year 1942?

A. At the end of nineteen hundred and forty-two it was ninety-nine thousand, seven thirty-three, twenty-one.

Q. And that was his net worth at that time?

A. That's right.

Q. After you deducted all the living expenses. Is that true? [399]

A. That is correct.

Q. And now——

The Court: Why don't you carry that through '43—or '44 and '45?

Q. What was it in 1944, at the end of the year 1944?

A. It was a hundred and nineteen thousand, six sixty-one, seventy-six.

(Testimony of Robert E. Birch.)

Q. And at the end of the year 1945?

A. A hundred and twenty-nine thousand, two fifty-two, ninety-nine.

Q. Now, have you checked the number of bond and the amount of United States bond that Mr. Barcott has?

A. We did on the series D, E and G.

Q. Well, did he have any other bond?

A. He had some series B bonds.

Q. When were they purchased?

A. Well, they were purchased in 1936.

Q. '36. And the total amount of bond, how much did he have? What become of the 1936 bond, the series B? A. Those were cashed.

Q. When were they cashed?

A. I believe in 1946. [400]

Q. '46. That didn't include in this report. In 1945, then, how many United States bond did he have? '45, at the end of 1945.

A. At the end of '45 he had seventy-eight thousand, four hundred and fifty dollars.

Q. In United States bond. In adding all his asset, what other property did you take in consideration when you consider the value of it, did you take his home in consideration?

A. Yes, his home was taken into consideration.

Q. How much you take the home in the amount of the investment in the home?

A. In the home we have thirty-three hundred dollars.

(Testimony of Robert E. Birch.)

Q. Thirty-three hundred dollars, is that the amount that he paid for the home?

A. That's what he told to us, yes.

Q. And if he spent about three thousand dollar in remodeling and repair, then his asset would depreciate—decrease to the extent of three thousand dollars? Is that true?

A. Yes, if it was valued at more than that now, it would increase his assets.

Q. If he spent three thousand dollars in remodeling the house, then you didn't take that in consideration? A. No. [401]

Q. Now did you take in consideration any other asset that he had beside the United States Saving Bond and the house, did he have any cash on hand at that time that you took in consideration?

A. Well, we worked out a cash—a possible cash accumulation during the period.

Q. And as the cash accumulated, did the bond decreased or increased?

A. Well, in 1943 when he bought quite a few bonds, the cash decreased, and in '44 it decreased, too.

Q. How much the cash decreased in 1943? To what extent?

A. Around ten thousand dollars.

Q. Ten thousand dollars, and was that represented by increasing in the value of the bond or the number of bonds?

A. Well, he purchased more bonds during that time out of cash.

(Testimony of Robert E. Birch.)

Q. And as the cash decreased then, the bond increased, is that it?      A. That is correct.

Q. Where do we find that in this report, this right——

A. Well, I think you will find that on exhibit one.

Q. Exhibit one. You're carrying it as cash and as securities?

A. Well, we've got cash accumulated during the period. [402]

Q. Well, how much cash would we have in 1941, at the end of '41, we say?

A. Well, '41 it was sixty-two—sixty-two thousand, eight fifty-four, fifty-four.

Q. Was that all cash, or would it include other items which we had, which we——

A. No, that was possible cash, it could be——

Q. Possible cash. And in the last of December 1942, how much possible cash we had?

A. It was sixty-two thousand, five hundred and sixty-five, seventy-nine.

Q. And in the last of December 1943, how much cash did he have—possible cash?

A. Fifty-two thousand, nine hundred and eleven dollars.

Q. And how much bond did have——

A. Thirty-one thousand.

Q. How much?

A. Thirty-one thousand dollars.

Q. Thirty-one thousand.

A. Well, thirty-four thousand, four hundred and fifty, all together.

(Testimony of Robert E. Birch.)

Q. And in the year 1944, then what was the cash, possible cash?

A. Forty thousand, nine hundred and thirty-nine dollars and [403] seventy-six cents.

Q. And how much bond?

A. All together he had fifty-eight thousand, four hundred and fifty dollars.

Q. And at the end of 1945, he had how much cash?

A. Well, we discovered it to be thirty thousand, one sixty-six, forty-two.

Q. And bond, seventy-eight thousand, as you testified. A. That is right.

Mr. Gagliardi: Now, if your Honor please, we offer that identification number two—that A-3 in evidence. That's been properly now——

The Court: Are there any objections?

Mr. Pomeroy: Yes, I'll object on the grounds it is improper, irrelevant and immaterial and self-serving. He's testified as to what his opinion is as to how much he had, it's in evidence now.

Mr. Gagliardi: If your Honor please, it seems to me an auditor's report is always admissible in this kind of a case. He is an expert witness on the matter.

The Court: It will depend on the data. If he used documentary data for the compilation of the report, it would be competent. If he used information [404] from the accused, it would be self-serving and would fall under the self-serving rule.

(Testimony of Robert E. Birch.)

Mr. Gagliardi: That would be true if it was made by the defendant.

The Court: But, it is made by an employee of the defendant.

Mr. Gagliardi: It is the same basis which the Government used. We took the same position the Government used—took the same theory on the same basis, which we adopted.

The Court: No objection to this witness testifying as he has in detail on what the net worth was as he found it in the beginning of '42 and '43, and each year thereafter, as here involved. That is, upon the basis on which they rest their claim that there was an evasion of tax due. This witness has covered it, but covered it in much greater detail. There would be no objection to that, but the document itself. I will have to sustain the objection and allow you an exception.

It is time now for the morning intermission, so I think we will take a recess of fifteen minutes. The audience will remain seated until the jury pass out.

(Whereupon, the jury retired from the courtroom.) [405]

The Court: Now, how much longer will you——

Mr. Gagliardi: I think we are about finished. That is the last.

The Court: You indicated that you probably would call some character witnesses.

Mr. Gagliardi: I told Mr. Ursich in this case it is worthless.



(Testimony of Robert E. Birch.)

The Court: Well, the Court cannot advise you on that.

Mr. Gagliardi: I know, your Honor.

The Court: The Court will be at recess then for fifteen minutes.

(Recess.) [406]

Q. Mr. Birch, in calculating this income and expenditure, did you use the same method that the Government agent, Mr. Swanson, testified that he used too?

A. Yes, it's primarily the same.

Q. And why is there difference between the total amount that you arrive at and the total amount that Mr. Swanson arrived at? What——

A. Well, the primary difference between the two of them is due to the fact that we attempted to show in here the accumulation of cash over a period of years. In other words, the Government's report, I believe, contends that the cash at the end of '42, was twenty-three thousand dollars, and at the end of '45 it was twenty-three thousand dollars. Well, this report of ours shows that it would have been possible to build up perhaps a cash of sixty-two thousand dollars. I think the primary——

Q. Did you take in consideration any other source of income which was not reported for income tax purposes, which Mr. Swanson did not take in consideration?

A. Yes, we—Mrs. Barcott's earnings were not taken into consideration.



(Testimony of Robert E. Birch.)

Q. The Mrs. Barcott earning then is added to your total? A. That's right. [407]

Q. And that is not added to the total of Mr. Swanson? A. I don't believe it is, no.

Q. And that is the main difference between you two? A. That's right.

Mr. Gagliardi: You may cross examine.

### Cross-Examination

By Mr. Pomeroy:

Q. Mr. Birch, how long have you been a certified public accountant?

A. Since May of '46.

Q. That's a little over a year, is that right?

A. That's right.

Q. And you prepared this statement last Thursday? A. That is correct.

Q. And——

A. That was typed at that time.

Q. Well, how long did it take you to figure this out?

A. Well, I had been working on it for about a week.

Q. About a week. In other words, just this last week, why you worked on it. And in this statement yourself, you state that the information that you built this statement up on was obtained from Mr. Barcott, isn't that correct?

A. That is correct. [408]

Q. You didn't certify to any of these things that he told you? A. No, I did not.

(Testimony of Robert E. Birch.)

Q. It was impossible for you to.

A. That is correct.

Q. There were no sales slips or cash register slips or anything like that, that you could check?

A. Not for those years at all, no.

Q. And the amount of money that Mrs. Barcott received in tips was told to you, is that correct?

A. That is correct.

Q. And you don't certify to those amounts?

A. No, we do not.

Q. And the amount of earnings in the business were told to you by Mr. Barcott?

A. Not for those years. We went on the basis of the maximum amount allowable without paying any income tax.

Q. In other words, you took the figures of the maximum amount of money that he could have earned——

A. Without paying any income tax.

Q. ——without paying any income tax.

A. That is correct.

Q. And you have kept that as one figure all the way through and added to it, that's what you are talking about, isn't it? [409]

A. That is correct.

Q. Did Mr. Barcott tell you that he saved every cent that he made during all those years?

A. No, he didn't come out and actually tell us that. We talked to him several times in regard to figures that we had here.

(Testimony of Robert E. Birch.)

Q. Well, the figures that you have here would indicate on a cash basis, that he had saved every——

A. That is correct, we inferred that.

Q. In other words, he hadn't spent a cent for anything.

A. Outside of living expenses.

Q. Well, outside of the living expenses.

A. That is correct.

Q. Now you added a figure here of thirty-three hundred dollars as the cost of the residence, is that right?

A. That is correct.

Q. And that figure was told to you by John Barcott?

A. That is correct.

Q. Now, on your item number one, exhibit number one, did you deduct that amount from your net worth, from the earnings, or where did you get the thirty-three hundred dollars to buy the home with?

A. Well, that was reduced in the cash. In other words, any adjustments that would have come through during the years [410] would have been a cash adjustment.

Q. You did reduce it, is that correct?

A. That is right.

Q. In 1926, referring to Exhibit number two, his earnings and what you figured he had on hand was twenty-two thousand, six hundred dollars, is that correct?

A. What was that again, please? '26?

Q. 1926. At the end of 1926, your figures show that he had on hand twenty-two thousand, six hundred dollars, is that correct?

A. Twenty-four thousand, three hundred.

(Testimony of Robert E. Birch.)

Q. Well, I'll refer you to exhibit number two, in the year 1926.

A. That was his earnings by the business.

Q. And that would be the amount of cash——

A. Well, accumulation, that's right.

Q. That's what he had accumulated out of the business. And what year was it that he—that was a half interest in the business, wasn't it?

A. At that time, I believe it was, yes.

Q. What did he tell you about his partner at that time? A. In what way do you mean?

Q. Did he have a partner after 1926?

A. I really don't remember. I don't recall whether he had [411] it singly or not.

Q. Well, did he make the same amount of money, did he tell you, before 1926 as he made after 1926, when he bought out his partner?

A. He didn't tell us exactly how much money he made. He didn't remember how much he made.

Q. He didn't remember how much he made.

A. No.

Q. Did he tell you that he had bought out his partner in 1926?

A. Yes, was it '29? I don't know what year it was that we added that additional cash. '26, yeah.

Q. And how much money did he say he paid his partner? A. Fifteen hundred dollars.

Q. Are you sure he told you fifteen hundred dollars, or that he just got rid of his partner?

A. Well, that was the figure that he said, was that he bought out for fifteen hundred dollars.

(Testimony of Robert E. Birch.)

Q. And you're not certifying any of that?

A. No, we're not.

Q. In other words, he told you that at that time when he had an earnings of twenty-two thousand, six hundred dollars, he bought out half interest for fifteen hundred? A. That's right. [412]

Q. Now, I refer you again to your exhibit number one, in the year 1936, you show a purchase of bonds in the sum of three thousand four hundred and fifty dollars, is that correct?

A. That is right.

Q. Can you show on your figures how you reduced your earnings on that year to take care of that three thousand four hundred and fifty dollars?

A. Reduced your earnings?

Q. Well, where did the money come from, if you know?

A. That was from the cash that could have possibly have been accumulated during those years.

Q. And did you reduce it? In that amount?

A. Well, there was other items entered into it. In other words, his income would—partly would offset it, and so forth.

Q. It was offset by income?

A. Well, that's right. Through those years we would have to take everything into consideration.

Q. What income did he have in the year 1936, according to your figures?

A. Well, we figured that there was a total of approximately thirty-three hundred dollars.

(Testimony of Robert E. Birch.)

Q. A total of thirty-three hundred dollars? [413]

A. Yes.

Q. And that year that he earned thirty-three hundred dollars, he bought thirty-four hundred dollars worth of bonds, according to your figures. Now, on these insurance policies—insurance policies that you have listed on exhibit number one of your report now marked as Exhibit A-3, at the end of 1945 you show a—premiums paid of four thousand, one hundred and sixty dollars, don't you?

A. That is correct.

Q. And is that reflected in your net worth?

A. That's been added into it, that is right.

Q. How can you add insurance premiums into net worth?

A. Well, we went on the basis that it was cash outlay. Technically, we shouldn't have added it in. If it was a, for example, a true balance sheet in the sense of the word that you would show the cash surrender value of anything in there. What we were trying to arrive at was the possible accumulation of cash throughout these years.

Q. Well, if he paid out the insurance premiums, how could he have it as cash?

A. Well, he built up one against the other, is the way we would term it. In other words, it reduced his cash but he built up his insurance. [414]

Q. Well, how could he build up the insurance by paying premiums. Wouldn't it be the cash surrender value of the policy?

A. Yes, probably we should have put the cash surrender value.

(Testimony of Robert E. Birch.)

Q. In other words, this isn't a true asset, is it?

A. Not entirely, no. It wouldn't be an exact asset.

Q. In other words, you actually—if there had been an accounting system here, you should have figured the cash surrender value, rather than——

A. We should have put the full surrender value, yes.

Q. On your exhibit number two, you have the earnings of the business and you have Mrs. Barcott's cash received, and you show her as receiving how much? How much did you figure that she received, how did you arrive at that?

A. Why, we figured on a basis of sixteen years, seven and a half dollars a day, for three hundred days a year. It was about twenty-two hundred and fifty dollars a year.

Q. In other words, you figured that Mrs.—were you told that those were tips that she——

A. That's right.

Q. So you figured that over a period of sixteen years, in your figures, that she received seven dollars and a half a day, working every day in the year, practically. [415]

A. Well, three hundred days, that's practically every day in the year.

Q. That's six days a week, practically, and Sundays off. And so you figured that, from what year to what year?

A. Well, the years we had here, from 1920 through 1935, a total of sixteen years.



(Testimony of Robert E. Birch.)

Q. 1920 to 1935, a total of sixteen years.

A. Uh-huh.

Q. Did they tell you that she took a trip to Europe and wasn't working?

A. Well, we understood that that was part of it——

Q. Did you take out the time that she was gone to Europe, or did you pay her seven and a half a day all the time she was in Europe?

A. Well, I believe it was included in there.

Q. In other words, you gave her seven and a half a day. How could she get tips when she was over in Europe?

A. I really don't know how she could have.

Q. And when was she married to Mr. Barcott?

A. I don't know the exact date.

Q. How many children did she have?

A. Well, there was two, and three, I believe, as far as I know.

Q. Two and three? [416]                      A. Well,——

Q. When did you start figuring him with an exemption for a wife? Wouldn't that be the time that you decided that she was married?

A. That was 1920.

Q. In other words, you have it figured that they were married in 1920?

A. That's when the exemption came through, yes, 1920.

Q. Well, now, who told you that they were married in 1920?

A. We were told that it was around 1920.



(Testimony of Robert E. Birch.)

Q. Around 1920. By whom?

A. I believe it was Mr. Barcott.

Q. Mr. Barcott told you that he was married around 1920, and you gave him an exemption for a wife from that date, is that right?

A. That's right.

Q. Now when did you give him his first exemption for a child?

A. Well, I believe his son came over, so we gave him two hundred dollars in that year, too, that year.

Q. You gave him what?

A. We gave him two hundred dollars for his son, that was born over——

Q. Exemption? [417]                      A. Yeah.

Q. For his son, when? When did you start that?

A. In 1920, two hundred dollars.

Q. Right away. And when was the next child that you gave him an exemption for?

A. I believe it was 1924.                      Q. 1924?

A. I'll have to check that and see. Yes, it would be 1924 when a change was made. Yes, 1924 would be eight hundred dollars.

Q. Eight hundred dollars, that would be for another child, is that right?

A. That's right, that's true.

Q. And did you take any time off for her to—off from the seven and a half a day, for her to have this child?                      A. I didn't.

(Testimony of Robert E. Birch.)

Q. You paid her seven and a half a day for tips all the time that she was at the hospital having the child. And when did you—you had another exemption for another child, didn't you?

A. 1925.

Q. And did you give her any time off then to have the child, or did you pay her seven and a half all the time that she was having the child?

The Court: You'll have to answer out, we don't get your nod.

The Witness: I beg your pardon, your Honor.

A. No, we didn't take that into consideration.

Q. You didn't take that into consideration?

A. No.

Q. Did they tell you that she was a cook some of the time?

A. No, I don't remember anything on that.

Q. Did you give her time for tips when she was a cook, just as much as when she was a waitress?

A. Well, we just took a blanket seven and a half dollars a day.

Q. No matter whether she was away on trips or having children or anything, you just gave her seven and a half a day and making it clean.

A. That's right.

Q. Your figures would be entirely different if the tips had been only four dollars a day, wouldn't they?

A. Yes, it would have made a difference.

(Testimony of Robert E. Birch.)

Q. Now, turning to your exhibit number three, you—living expenses, seven hundred and fifty dollars a year. That's what you charged in 1919, is that right?

A. That is correct.

Q. He was married that year, according to your figures. [419]

A. I believe he was married in 1920.

Q. Well, seven hundred and fifty dollars was living expenses in 1920. He was married that year, is that right? And seven hundred and fifty dollars in 1921. He was married that year.

A. That's right.

Q. And a thousand dollars in 1922, is that right? And he was taking an exemption for a child at the same time. Then you jumped his living expenses to fifteen hundred dollars a year. What was the basis of that kind of figuring?

A. There was no particular basis. I mean, in other words, your living expenses was more or less a guess on it.

Q. Were you juggling these figures in order to get a certain result?

A. No, we weren't juggling any figures.

Q. What's your reason for going from seven-fifty to one thousand, to fifteen hundred?

A. Well, it's just an estimate all the way through on it.

Q. Well, then you get down to 1931, and then you go to 1932 and you only charge him twelve

(Testimony of Robert E. Birch.)

hundred dollars for living expenses. Why do you drop down from fifteen hundred. Had it become cheaper to live for him after 1930? [420]

A. That is just another, as I say, just another estimated figure that we used.

Q. Who gave you these figures, or did you just pick them out of the air?

A. We just assumed that it would take approximately so much, we talked to him——

Q. Who are “we”?

A. Mr. Barcott said it would cost so much maybe to live, or somethink like that.

Q. You mean you and Mr. Barcott together?

A. Well, my partner was with me, and so forth.

Q. Who is your partner?           A. Mr. Vale.

Q. Mr. Vale. So you and Mr. Vale and Mr. Barcott, you were assuming all these things in order to get these figures together, is that right?

A. We assumed his living expenses would amount to so much.

Q. Well, did he give you any reason why they should drop fifteen hundred to twelve?

A. No, there was no reason given.

Q. Well, that——

A. We told him—we asked him if approximately that would be right, and he said, “Well, probably it would be about right.” [421]

Q. Well, he had more children in 1930 and '31 than he had in 1923, didn't he? He didn't have any children living with him in 1923. He had a boy in Yugoslavia, and you give him fifteen hundred

(Testimony of Robert E. Birch.)

dollars a year to live on, and in 1934—'33, '34, '35, '36, '37, '38, '39, and clear up to 1945, you just charged him twelve hundred dollars, and gave him twelve hundred dollars for yearly living expenses.

A. That's an estimate.

Q. Does that seem logical to you as an accountant?

Mr. Gagliardi: I object, if your Honor please, because of the conclusion the jury draws——

The Court: Objection will be overruled.

A. Well, it's hard to tell on living expenses. In other words, I don't think—I personally do not feel that you can determine any particular or any exact amount of living expenses in comparison from one to another. It depends on the type of family they are, how they live, and so forth.

Q. Well, you're up here as an experienced accountant, aren't you?      A. That's correct.

Q. And you're testifying to this Court and jury concerning figures, and you're—that's your business, isn't it? [422]      A. That's right.

Q. You do this all day long for other people, as well as Mr. Barcott.      A. That's correct.

Q. Now, does it seem sensible to you, as a certified public accountant, that a man in 1923, when he had no children, would spend fifteen hundred dollars a year to live on, and from 1932 up to 1946, all during these war years and everything, he only spent twelve hundred dollars a year to live on?

A. It's a possibility.

Q. You believe that?

A. I said it's a possibility.

(Testimony of Robert E. Birch.)

Q. And you'd stake your reputation as a certified public accountant, on that statement?

A. A possibility, that is correct.

Q. Now taking all the figures that you've put together here with all these seven dollars and a half every day over all these years, and down to the item in exhibit number three, you still show an understatement of income, don't you? That they are still liable in income tax.

A. No, I wouldn't say that.

Q. Well, don't you show a difference of forty-three thousand, six hundred and eighty-six dollars and eighteen cents, which is an understatement by them— [423]

A. Oh, I see what you mean. Excuse me, I didn't quite understand.

Q. Isn't that correct?

A. Yes, that's right.

Mr. Pomeroy: That's all.

### Redirect Examination

By Mr. Gagliardi:

Q. Mr. Birch, in 1920 what exemption do you give Mr. Barcott, what living expenses you allowed to him, according to your figures?

A. In when?

Q. 1919.

A. Seven hundred and fifty dollars.

Q. And in 1920 how much?

A. Seven hundred and fifty dollars.

(Testimony of Robert E. Birch.)

Q. And in 1921?

A. Seven hundred and fifty dollars.

Q. And then in 1922, you increased to what?

A. A thousand dollars.

Q. Was that the time when the child was born?

A. Yes, I believe that is correct. In 1924 there was an additional child.

Q. How many children did they have in 1924?

A. They had two.

Q. Two children. Then between 1920 and 1924 were two children born. In 1923, do you increase the amount for living expenses to fifteen hundred dollars?

A. That is correct, we increased it.

Q. And you keep that up until 1932, is that right?

A. That is right.

Q. Was that the time when John—that is, Anton worked in the restaurant himself and become self-supporting, and then he got married?

A. I don't remember the exact date that he got married.

Q. Anton got married in either '33 or '34, I don't recall—the jury will remember—but is that the reason you reduced the amount of expenses from fifteen hundred to twelve hundred dollars?

A. Yes, and that year, well he had three dependents for a period of years, and in '31 it dropped to two.

Q. And then——

A. In '32 it was two.

Q. Two, and in '33 what were they?

A. In '33 there was two. He had two.



(Testimony of Robert E. Birch.)

Q. And up to what date?

A. Well, we have it all the way through.

Q. All the way through, only two. [425]

A. Yes.

Q. And was that the reason that you——

A. It could have been the reason. I don't remember now.

Q. You were called about a week before this case was tried and you prepared this report.

A. That's right.

Q. Now, in allowing Mrs. Barcott to take a trip to Europe, you didn't allow any deduction for her regular income of seven dollars and a half in tips which you allowed?

A. No, we didn't make a deduction for that.

Q. You did not take in consideration that she had six thousand dollars when he started out in business?

A. No.

Q. Would one offset the other?

A. Well, it would take a little figuring, but I believe it would.

Q. And the same is true when she give the birth to the children? How many days in the year you figure that there was her seven dollars and a half income include? How many days in a year?

A. Three hundred days.

Q. Three hundred days. You left the fifty-two days out.

Mr. Gagliardi: That's all. [426]

(Testimony of Robert E. Birch.)

Recross-Examination

By Mr. Pomeroy:

Well, Mr. Birch, you said it would take a little figuring. When one six-thousand-dollar item would offset another figure of her trip to Europe, now how—you just do a little figuring and show us how a six-thousand-dollar item is offset by one hundred days at seven dollars and a half a day.

A. I didn't say it was exactly offset; I said it would approximately be the same.

Q. Well, how do you figure that?

A. It wouldn't be, it's true.

Q. Well, what would be the figure, between six thousand dollars and a hundred days at seven dollars and a half a day? If you can say that's approximately the same, why, you show us the figures.

A. Well, maybe that—there is quite a bit of difference in there, there's about five thousand dollars.

Mr. Pomeroy: That's all. [427]

Redirect Examination

By Mr. Gagliardi:

Q. That is five thousand dollars to our credit?

A. That's right.

Q. Well, my question as propounded to you was not to give us the correct figures, it was, would the six thousand dollars offset any possible day that you didn't take in consideration?

A. It could have, yes.

Mr. Gagliardi: That's all.

(Witness excused.)

The Court: Do you have any other witnesses?

Mr. Gagliardi: I think that we have no other witnesses, Your Honor, some stipulation that will have to be made between counsel, if two counsel have agreed. I don't know what they are, but maybe they——

Mr. Pomeroy: There was a stipulation to be agreed upon, and also I would like to call Mr. Barcott back for a few more questions.

The stipulation is to the effect that [428] Thomas F. Ray was a qualified attorney engaged in the practice of the law in the City of Tacoma, from 1906 until his death in 1944; that John Barcott was a client of Mr. Ray for a period of about fifteen years, beginning about 1928; that about May, 1943, Mr. Ray removed all of his office records and files from his office in the Puget Sound Bank Building, Tacoma, to his daughter's home near the Lakeside Boat Club, American Lake; and that after his death, sometime up until the present time, these files have become lost, scattered, or destroyed.

Mr. Hale: There is a stipulation between counsel for both sides, if Your Honor please.

The Court: Very well, the stipulation will be entered as a fact. The Court heard the reading of the stipulation in reference to Mr. Barcott's employment, and what records Mr. Ray had during that time was lost after the death of Mr. Ray. That is a statement of fact.

Mr. Pomeroy: There is another stipulation, if the Court please, that on the income tax return of John Barcott for the year 1945, there is an item

of twelve hundred dollars as being received by [429] John Barcott under the heading of "Other Sources, Miscellaneous" and that this twelve hundred dollars was added to the income tax return by the persons preparing the same, on the instructions of Mr. Ursich, the attorney for Mr. Barcott.

Is that the stipulation?

Mr. Ursich: To compensate for food which might have been taken out of the restaurant at that time by Mr. Barcott.

The Court: The jury will understand the stipulation just made as taking out of the case that particular item as it is agreed by both parties that situation actually took place.

Mr. Gagliardi: I have Mr. Birch for a little further testimony, Your Honor. I had forgot a few questions concerning dividends and interest, which I didn't question him. Mr. Birch, will you——

Mr. Pomeroy: Well, I'll stipulate that he has dividends and interest and they are approximately the same as what we have in there.

Mr. Gagliardi: And that it is reported in the income tax——

Mr. Pomeroy: It is reported. [430]

Mr. Gagliardi: That's right.

The Court: And you say you have a short question of the defendant, or two?

Mr. Pomeroy: I have two or three questions, it is not very long.

The Court: The defendant will take the stand.

The Clerk: Plaintiff's Exhibit 20, for identification.

JOHN BARCOTT

the Defendant, resumed the stand for further examination and testified as follows:

Recross-Examination

By Mr. Pomeroy:

Q. You are being handed what is marked for identification as Plaintiff's Exhibit No. 20, and I'm asking you whether or not your name appears on that exhibit?      A. Yeah.

Q. And you signed that, did you?

A. Yeah, I signed it. [431]

Q. And is that a—well, just a moment.

A. You mean this one here?

Q. Down at the bottom.

A. Yeah, that's right.

Q. You are being handed what is marked for identification——

The Clerk: Plaintiff's Exhibit No. 21, for identification.

Q. ——what is marked for identification as Plaintiff's Exhibit No. 21, and I'm asking you whether or not your signature on that exhibit?

A. Yes.

Q. You signed it, did you? What was your answer?      A. Yes.

Mr. Pomeroy: If the Court please, I am now offering Exhibits 20 and 21.

The Court: Any objection, Mr. Gagliardi?

Mr. Gagliardi: We have no objection.

The Court: They may be admitted.

(Testimony of John Barcott.)

(Whereupon the income tax returns of John Barcott for the years 1938 and 1939 were admitted in evidence as Plaintiff's Exhibits No. 20 and 21, respectively.) [432]

Q. All right, now, Mr. Barcott, Exhibit No. 20 is your income tax return for 1938, and that was prepared by Mr. Thomas Ray, who was your attorney, is that correct? A. Yes.

Q. And he prepared this merely from figures that you gave him, is that correct?

A. From my books, yeah.

Q. From figures that you gave him.

A. Yeah, from the books.

Q. And in 1939, which is Plaintiff's Exhibit No. 21, your income tax, that was prepared by Thomas Ray, is that correct? A. Yeah.

Q. And that was prepared by him from figures that you gave him?

A. Yeah, from the books.

Q. Well, you told him the figures, isn't that correct?

A. Yes, he was, he got the book and figured out of the books.

Q. Yeah, but you did the figuring, didn't you?

A. No, he was figuring himself how much we take in, how much we pay out and everything else.

Q. Well, weren't some of those books written in different tongue and a different language than English? [433]

(Testimony of John Barcott.)

A. Well, it was, he asked me for what's, how much, what's how much we take in and how much we pay out, and how much there's left. And he knows what it is. So many years he was doing that, and so sure he knows that.

Q. I believe you testified that you had a conditional sales contract on this electric stove at your home, in sometime in 1938, and you made payments on that, is that correct?

A. Something—that's right.

Q. All right. Now, in 1940 didn't you buy some equipment from the City of Tacoma Public Utilities for a hundred and one dollars and—this is in 1940, and also taken on conditional sales contract and you made payments on that?      A. 1940?

Q. Yes.

A. It must be toaster. electric toaster for Oyster House.

Q. All right. Now, I'll ask you whether or not you didn't buy some equipment in 1942 from the Robar Manufacturing Company for three hundred and six dollars, and you also bought that on a conditional sales contract?      A. Robar?

Q. Yes.

A. Something for the Oyster House, it must be.

Q. Yeah, and you bought that on a conditional sales contract. [434]

A. I think so, on payments, yeah.

Q. I'll ask you whether or not in 1939, October 18, that you didn't buy from the Underwood-



(Testimony of John Barcott.)

Elliott-Fisher Company equipment in the amount of sixty-six dollars that you bought on a conditional sales contract.

A. Yeah, I did, I thinks. I no have to pay—I know I no have to pay any interest on it, so——

Q. And I'll ask you whether or not in 1937, you didn't buy furniture from the Kaufman Leonard Company, and signed a conditional sales contract and make payments on that for furniture in the sum of four hundred forty-eight dollars?

A. I think, I think so.

Q. Now, did you pay for those—those payments on all the things I've just mentioned to you, from your wife's tips or from your earnings?

A. Now from my wife tips at that time, I bought those things from the restaurant, I pay from the restaurant.

Mr. Pomeroy: That's all [435]

Redirect Examination

By Mr. Gagliardi:

Q. Were those that you bought from the City of Tacoma, who bought it, your wife or yourself?

A. No, myself, for the Oyster House.

Q. For the Oyster House?

A. He says, you no have to pay, he says five dollars a month, that's all we had to give him, he says you no have to be bothered or anything, that's the reason I do it.

Mr. Gagliardi: That's all.

Mr. Pomeroy: That's all.

(Witness excused.)

The Court: Do you have any further evidence, Mr' Gagliardi?

Mr. Gagliardi: We have no further evidence, Your Honor.

(Defense rests.) [436]

The Court: Do you have any rebuttal, Mr. Pomeroy?

Mr. Pomeroy: One witness.

The Court: How long will it take?

Mr. Pomeroy: Well, two or three minutes.

The Court: Since it is past the hour for lunch, we will take intermission now until two o'clock, ladies and gentlemen of the jury.

(Noon recess.) [437]

2:00 o'Clock P.M.

Mr. Pomeroy: We have decided to rest our case, with the evidence already in, so at this time the Government rests also.

The Court: Well, there are some matters, ladies and gentlemen, that the Court needs to take up in the absence of the jury, and I am going to ask that you just step outside the hall there and close the door, and the Court will take up these matters.

(Whereupon, the jurors retired from the courtroom.)

Now, Rule 30 of the Federal Rules of Procedure provides that the Court inform counsel of its proposed action on the requests, prior to the arguments to the jury, but the Court shall instruct the jury after arguments are completed and I am going to

at this time indicate to you on your requests the attitude that the Court takes in reference to them, taking up first the request of the plaintiff.

Mr. Gagliardi: May we be heard first on our motion for judgment of acquittal, Your Honor? We desire at this time to make our motion that Your Honor enter a judgment of acquittal. [438]

The Court: Yes, you may be heard now. I am not going to hear any argument on the matter. I will let you make your motion because I gave you almost an hour's time at the conclusion of the Government's case. [439]

Mr. Ursich: Very well, if Your Honor please, I will just make a brief statement.

Your Honor, at this time we are again asking the Court to—we are making a motion at this time for a judgment of acquittal on the grounds and for the reason that there is insufficient evidence upon which to convict the defendant as charged. The indictment and the bill of particulars indicates that we were to be put on proof, they would be showing an income from a certain business known as the California Oyster House.

I submit to Your Honor at this time, that there has been no evidence whatsoever introduced to the effect that any income was derived from said business which was not previously reported by the defendant.

The Court: Well, I suppose you submit the authorities that you did at the close of the Government's case, and the arguments that you made at that time you desire to have considered at this time.

Mr. Ursich: Yes. We have some further authorities on the matter of the bill of particulars which we can submit to Your Honor in writing, or I can briefly——

The Court: No, I do not think that is necessary, Mr. Ursich. I shall have to deny the motion [440] and grant you an exception.

Mr. Ursich: Very well.

The Court: Now, we will take up this matter of the instructions.

On the plaintiff's request that Instruction No. 1, that is given in substance, though the language may be somewhat different than that submitted by the plaintiff.

The requested Instruction No. 2 is likewise going to be given by the Court in substance, and the same is true of the requested Instruction No. 3.

The requested Instruction No. 4 is given.

Now, as to the defendant's requested instructions, defendant's Instruction No. 1 will be given in substance.

Defendant's requested Instruction No. 2, the first paragraph of it will be given in substance, the paragraph beginning with line 20, sub (a), is refused, and (b), beginning with line 24 is given in substance, and (c), beginning on line 28, continuing through to the next page, is refused.

Instruction No. 3 as requested, is given in substance, and the same is true of Instruction No. 4 as requested. [441]

Instruction No. 5 is given.

Instruction No. 6 is given in substance.

Instruction No. 7, the first paragraph of it is given in substance. The second paragraph is refused as not being an issue in this case.

The supplemental instruction which I have numbered 8, for the purpose of the record, is given in part and refused in part. The second paragraph of your Instruction No. 8 is given generally, in language other than the language in which you have submitted it.

That part of the first paragraph of your Instruction No. 8 will be given which reads:

“You will not be justified in this case of convicting the defendant of having wilfully and knowingly attempted to defeat and evade the payment of his just tax.”

That is not in that language, but the last phrase of it is not being given. That is the language reading:

“If you find that small amounts were omitted from his income tax return which could easily be overlooked or forgotten by the defendant.” The Court declines to give that, and I might state to counsel, because the Court is going to instruct very specifically upon the [442] fact that there must be a wilful attempt to evade the tax. The language of the act doesn't state the amount. It may be a large amount or it may be a small amount, or it may be an indefinite amount, and of course if it was an unintentional evasion of some small item, why it would not—could not possibly, under the general instructions as the Court gives them——

Mr. Gagliardi: Under the rule is it incumbent upon the defendant to except now, Your Honor, or the exceptions allowed without be taken?

The Court: I think you might as well make your exceptions if you wish now, as to what the Court has refused to give, but you will have an opportunity at the conclusion of the case, in the absence of the jury, to make your exceptions to the instructions as a whole.

Mr. Gagliardi: Then at this time the defendant excepts to Your Honor's refusal to give that part of Instruction No. 2 which Your Honor has designated you refuse to give.

Also the part of Instruction No. 7 which Your Honor has refused to give, and that part of Instruction No. 8 which Your Honor has refused to give to the jury. [443]

The Court: The exceptions will be noted and allowed, Mr. Gagliardi.

Now you may bring in the jury.

Mr. Pomeroy: It is my understanding we will have an hour, each?

The Court: Yes.

Mr. Pomeroy: I would like to be notified when I have talked a half hour so I can gauge my time, and I suppose I will have the balance of the hour for concluding my argument?

The Court: Yes.

(Whereupon, the jurors resumed their seats.)

The Court: You may proceed now, Mr. Pomeroy, with the argument. [444]

Mr. Pomeroy: If the Court please, and counsel, and ladies and gentlemen of the jury:

Although I think for practically all of you this is your first opportunity to be a juror, I want to thank you for your kind attention. You have all been very attentive to this case, and it is an important case. It is important to Mr. Barcott, the defendant, and it is also important to the government. We are each going to argue our side of the case to you, and after that the Court will give you instructions. These instructions are going to be given to you orally; they are not written in Federal Court, and then you will retire with the exhibits which have been admitted in evidence, and your recollections of the evidence and instructions of the Court, to deliberate and bring in a verdict in this case.

Sometimes I think that an argument is kind of an anticlimax to a trial. A case is tried on witnesses, and the facts, and when you clearly have those in mind, why, it isn't necessary for the attorneys to argue, because after all, all we can do is argue the way we see the case and try to recollect as closely as we can what we think the witnesses said to you on the stand and what we believe about their story.

You don't have to believe any of us attorneys as to what we say in this argument, because [445] you have your own recollection. In fact, you are closer to the witness than we are. There isn't a witness that has been in this case that I think that I ever saw before in my life, so you know just about as much about them as I do. But it is our chance, at



least, to explain to you what we think the material facts in this case are, and what we think you should pay attention to and think about in bringing in the type of verdict that each attorney would like to have you bring it.

Now at the opening of this case, if you recall, I made an opening statement of what I thought the evidence would show, and I believe what I stated to you at that time was borne out when these witnesses took the stand, and we proved to you through this evidence the various things that I pointed out in that opening statement, and if you recall, I read the indictment to you. Now this indictment, again, is not evidence, but the original of it will go to the jury room with you, merely to point out to you what the defendant is charged with.

In this indictment, as I told you, contains three counts. Each of them relate to a wilful evasion of income taxes. The first count deals with the year 1943; the second count for the year 1945, and the third count for the year 1946—the third [446] count 1945, is that correct? Thank you, Mr. Gagliardi. And as I told you before, the amounts involved here must be proven as substantially true. There must be some substantial evasion of income tax in order for you to bring back this verdict of guilt, and as I pointed out to you before, this is half of the income of this community of John Barcott and his wife. That is, she reported just as much as he did on a community basis, and therefore, they are not being charged with the half of it—of the income that we claim that they actually made: and we point out in

Count I in which the grand jury return of the indictment, the dividends, \$140.00; interest a hundred forty-one ninety-three; interest on bonds \$200.00; income from business \$24,621.96, or a total income for the community for the year 1943 of twenty-five thousand a hundred and three dollars and some cents; whereas, he only reported twice the amount of \$6,720.00, or about half, and should have reported about twice the amount that he did, according to those figures.

In Count II the charge is made that he only reported \$5,632.57, which is half of the earnings of the community, and our allegations are when we total up what we claim he made, that he should have reported \$10,426.61; and [447]

Count III charges that he claimed that he received as half of the community income \$7,388.98, and we claim he should have reported \$11,638.92.

There is no other way we can present a case to you except by bringing these witnesses here, and testifying as to what they know about these allegations that we make in the indictment; and I think one of the instructions that the Court will give you, that you are the triers of the fact. In other words, each one of you is a judge in himself or herself, of the facts of this case. The Court will instruct you what the law is, but each one of you is a judge as to whether the person is telling the truth or not—as to whether or not the facts are as we claim them to be. So, each one of you is a judge in that respect.

And I believe the Court will also instruct you that if you find that a witness is testifying incor-

rectly or falsely about a material thing, you are privileged to disregard his or her entire testimony. And this same instruction is true as to the defendant, as much as it is to any witness; that if you believe that he has testified falsely in any material thing, then you are at liberty to disregard all—any other testimony that he may give, except that which may be corroborated by other good and competent proof. Now I want you to bear that [448] instruction in mind, and most of you, as I understand it, have never heard these instructions before, and therefore I wish you would pay strict attention to that because I think it is important in this case that that instruction be given strict attention.

Now when you go to the jury room, besides the formal indictment, you will take all these exhibits with you. These exhibits, as you recall, will show you the actual income tax return—a photostatic copy of it, of Mr. Bareott, and show you copies of his bonds and where he purchased them, so you can check the figures as you recall them from the evidence. You will have other income tax returns. You will have computations from the bank and you will have photostatic copies of deeds and conditional sales contracts, and so forth, and you ought to go over them at length in order to arrive at your verdict.

Now as far as our case is concerned, it's all contained in one witness, and that is Mr. Swanson, here. And as you recall, I explained to you how these amounts were arrived at, and then you recall last week they had Mr. Birch, a certified public

accountant, make a similar computation, and after all the—I'm not much of an accountant myself—I don't know how many of you are, but I doubt if many of you are much of an accountant [449] either when you listen to the way these other accountants go about it. In fact, I need help in fixing up my own income tax. Well, after the testimony is blown away, we find that even Mr. Birch testifies that there is an understatement of \$43,000.00 in income tax that he can't account for. That's his own testimony after the way he figured it from the figures that Mr. Barcott gave to him.

And Mr. Swanson testified they found this \$23,000.00 in cash, and he was not charged with that. That was given to him. We didn't even figure that in our computations. They took the savings account in the National Bank of Washington; they took the checking account in the National Bank of Washington. They took the United States Savings Bonds at cost, and that is the one item, as I explained to you, that jumped so much from December of '42 until December of '45, and broken down you could tell just exactly in what year, and of course these exhibits will show you—you can look at the dates on them. You will find that outside of those few Baby Bonds that were bought in '37 that all the bonds were bought during that—those years when income was so great in the City of Tacoma.

They figured his home and furnishings; his business fixtures; the stock in the Fisherman's Packing [450] Corporation; the lots that he had out here in Tacoma, and then these other two lots that he

paid, so we thought, \$750.00 for, and there is a sheet in here, I believe, that says that is now a thousand dollars; and so after you compute the whole thing you find these figures which I read to you and which you will read when you go into the jury room with that indictment and I am sure that these figures will check, because you can see what a deal that Birch had to go through in order to clarify these figures, or change your mind about them, and when it was all broken down, even with the figures that he admits he put in there, such things as insurance company premiums, which he as a certified public accountant knows are not assets. All you can put in as assets, and most of you have insurance policies, is the cash surrender value of that policy, not how much in premiums you pay each year. But after he built the whole thing up, he says that the man had thirty thousand dollars on December 31, 1945. Well, we found only twenty-three thousand, so that is giving him credit for only seven thousand more, and still his figures still shows that he was out forty-three thousand. If you add the seven thousand on he would be fifty thousand off. We don't know where the \$7,000.00 is. Perhaps at the time Mr. Barcott had \$7,000.00 some place else than in this one [451] safe deposit box that we happened to look into, because as you recall, in his own testimony and in the testimony of Mr. Nielsen, he thought it was only ten thousand to begin with but it turned out to be twenty thousand.

Now these witnesses that testified before you—this case is—this is the third day, a little over a

week end, and I would just briefly like to go over the way that I—I—I noticed these witnesses and what they said, and what's material to this case.

Mr. Barcott at no time until he came into this court room has made one iota of a statement about tips, but that's the defense that they finally bring in here at the last minute at the time of trial. I think that is a very novel idea. I never heard that one before, but I think that's a pip. They lived on the wife's tips over all these years and he saved every nickel—one of the most ridiculous stories that I have ever heard of. If he can get twelve good people and true to believe that, then he deserves to be acquitted, because that's the most ridiculous statement—the most ridiculous defense that I ever heard of, but he had no defense until he walked into this court room. What did he say to Mr. Swanson? What did he say to Mr. Nielsen? Did he ever mention tips? Did he ever mention tips to anybody? No. When is the first you hear about it? When he walks into [452] here. He had to have a defense. What am I going to do? Tips, which is rather embarrassing to the wife, to all his friends. In other words, his wife has to take the stand, and you know as well as I do that the wife is going to protect her husband as far as possible, and I don't blame her. I think that is right, but to put that woman through that embarrassment and getting her on the stand and telling the things that she did, all through their married life, I think is terrifically embarrassing to her.



Now she gets on the stand and says that she never had a day when she received less than seven dollars in tips. It was often eight dollars, and sometimes on week ends it was ten and twelve dollars. Now this, mind you—the testimony goes on from—all the time she worked there, through the depression and all years. It's fantastic, unbelievable.

Besides that, when they go to cook up the books and fix up the books, they give her credit for seven dollars and a half tips all through those years, and you remember her own testimony was that some of the time she wasn't a waitress. She was a cook. Are they trying to tell us that people—customers, walked in there and walked back in the kitchen and handed her a tip, so she collected seven dollars and a half worth of tips when she [453] was cooking?

She had two children during this time. Took a trip to Europe. She had a trip—she said "I had other trips," something about a world's fair in California. Trips to Aberdeen, and still, they build up these books \$7.50 a day she took in in tips. It's a very fantastic story. I didn't cross-examine her much about it. I can't see how anybody could believe it, and in the way that a wife should, she said "I gave all my money to my husband. I never kept anything. I gave him everything I had." That's probably true. I think this man loves money, and I think he has held on to whatever he could. I think probably they have lived frugally, and I think he does like money, but he never was able to accumulate the money that he now has except during these war years when business was good in Tacoma.



Then one of the worst pieces of acting I have seen in a long time was when they brought in this poor woman, Mrs. McCord, and put her on the stand—a waitress who had been there for years, working now for Mr. Barcott, and bringing out the fact that her son was killed in the war and making her cry on the stand. One of the worst pieces of ham acting I have ever seen anybody pull for a long time, and then try to get the woman to testify to these tips, and she couldn't. She wasn't [454] going to get up here and perjure herself. I think she was honest, and I felt sorry for her taking the stand. She wouldn't testify what the tips were during the depression, and why? You know as well as I do. They didn't make that kind of money during the depression. It's silly to even think so, and I think her testimony was fair when she said that her average tips since 1938 was a low of \$3.00 and a high of five. Now that's a pretty fair estimate. I think that woman was an excellent witness. It's too bad that she had to be dragged in here for the purpose that they used her.

Then they bring in Mrs. Dasher, another waitress. They bring her in because Mrs. McCord didn't do a very good job for them—they bring in Mrs. Dasher. She has been a friend of theirs for about twenty years. In fact, worked there. Then she testifies what? Just exactly what they have been looking for. Somebody to testify that they had been making a lot of money in tips, so she says "Yes, why I was making a lot of money in tips. In fact,

I made \$60.00 a week or sixty or better a week in this place.” Now this is, mind you, in 1931, but she gave up her job and went to California and came back and worked on the Gig Harbor line. If a woman, such as she appears to be, were making—was making sixty dollars a week, do you think that she would give up that job? [455] That was a pretty good job in those days. You think back to 1931. If this waitress was making that much money she wouldn’t be giving up that job to go off some place else and come back and work on this other lunch counter.

Mr. Knaga took the stand. He’s a friend of the Barcott’s, and I don’t know yet exactly what the reason for calling him on the stand was, except to prove that he charged—Barcott charged Knaga some money. He says he borrowed five, or six, or seven hundred dollars—he doesn’t remember how much, and so he gave him a deed, but the deed came from somebody else because Knaga hadn’t bought it yet—somebody by the name of Pellys gave the deed to Barcott, and then he takes it back. Did you pay him any extra money for the loan of this five, or six, or seven hundred dollars? No, he didn’t pay any more. He couldn’t explain why it was one thousand dollars written right in there, so if he only borrowed five or six hundred dollars this fellow Barcott was really charging him for it—not that it makes a great deal of difference, but it shows he did make some money off of it. Whether that was reported or not I don’t know.

Then they had Anton Barcott take the stand. Now Anton Barcott seems like a pretty fine young fellow to me, and I liked his testimony very much. He worked [456] for his father and his stepmother down there, and liked to work down there. The odd thing is that they had him working for carfare and they gave him fifty cents once in a while to go to a show until he got married. Then after he got married they paid him fifteen dollars a week, and do you remember Barcott's story about the real estate contract and selling him the house? He says "Yah, I made him sign a real estate contract and made him pay in the bank because he was a spendthrift with his money,"—throwing his money around. Fifteen dollars a week and married. Barcott says he was a spendthrift, throwing money around. But he turns around in 1946 and gives him the business. I guess he wasn't a spendthrift any more, he couldn't throw away that fifteen dollars a week that he and his wife earned. The young fellow really worked down there and I think Barcott got the results of his labor, and I don't know yet who actually owns the California Oyster House today because Mr. Barcott likes money, he got into income tax trouble in 1946, and he turned around and turned it over to his son. He's still a young man. He's pretty healthy. I don't think he would have given it away if he didn't have a feeling of guilt about this matter. He turns around and gave it to his son. It's a pretty close family. I don't know whether that bill-of-sale or whatever was made out is actually a bona fide bill-of-sale or

not, but I certainly can find no fault with Anton Barcott, and I certainly think it's rather odd to call him a man—a spendthrift or throwing his money away on fifteen dollars a week when he was married.

Mr. Suryan took the stand. He's a brother-in-law of Barcott's. Suryan was the one they called in, as you recall, because of the fact that this income tax evasion case was started by the fact that it was reported that Mr. Barcott had received ten one-thousand dollar bills over at the bank. This was in January, 1946. Mr. Suryan takes the stand to show that he was really the one who was going to borrow some money from Mr. Barcott. What is his testimony? Apparently that wasn't very well straightened out, because he said yes, the summer before he was planning on having a boat built which would cost him about \$40,000. and that's when he wanted to borrow the money, the summer before. Then he decided not to build a boat, but he was going to buy one, and then he bought one. Well, when did you buy it? Oh, just after Christmas. Well then they hemmed and hawed around a while, and finally figured it was over in February. Why did they have to get it over in February? Because he didn't go down to get these ten one-thousand dollar bills until January. That's why they had to push that over, but what is the thing we should remember is, that the man said the first thing that would be the truth. When was it that you bought your boat? Now he was not borrowing the money to buy the boat. It was the summer before that he was going

to build it, but he was going to buy a boat and bought a boat which he wasn't borrowing any money for, just after Christmas. You see the two stories don't fit in together at all.

Then I felt sorry for poor Mr. Birch. Mr. Birch—who has been a certified public accountant since a year ago May, was hired by Mr. Barcott about a week ago to come in here and testify and to build up a system of accounting to justify this tip business which we first heard about when they came into the court room. He starts out, and he admits that none of these figures are his except just the bank balances and so on which he had an opportunity now to see, but that everything was given to him as outlined by Mr. Barcott—that is the amount that they made, they took the amounts that we showed as having been paid in income tax and then he built this whole picture up to the extent that he could justify the statement that he was entitled to have this much cash on hand. In other words, if he didn't spend any money for anything, the whole family expenses came out of the tips of the wife—and he ends up December [459] 31, 1945, with a cash balance of \$30,166.42. Now where was that? Could that have been in this other safe deposit box that we finally heard about sometime later, because, you see, he showed us twenty-three thousand as being the actual cash in money, but Birch figures it up to this \$30,166.42. Now where Mr. Barcott had that extra money, if these figures are correct, I don't know, but remember that he has been figuring this up so that it builds up his net worth over all the years; that he was worth a

lot of money even in 1930—even in 1940, and it wasn't a fact, as we claim; that he made this money during the war years here in Tacoma. And, you know, he never spent very much money. These trips to the World's Fair and back to Europe and so forth, they still were living on what? Fifteen hundred dollars a year up to 1931, and then twelve hundred dollars a year up to the present date. That is the only expenses that they had.

Mr. Birch in submitting his testimony, I think explained to you on the first two or three questions that I asked him, that this is not a certified report; that it couldn't be. There is nobody that can certify a report where he builds up a bunch of figures from what somebody else tells him, where he can't verify them, so although he is introduced to you as a certified [460] public accountant, this opinion—or this evidence that he gives is not certified to you as accurate—only what Mr. Barcott told him.

Then we get down to Mr. Barcott's own testimony. Mr. Barcott took the stand—I believe he was on the stand most of one day, and you have observed him here in the court room and you are the judge whether or not you believe the story he was telling you on the stand, or not. You are privileged to take into account in your deliberations his demeanor on the stand. How did it appear to you? Do you think he was telling you the truth? Does his story hold together? What did he say? He kept referring to poor old Mr. Tom Ray as being his attorney, and Tom Ray had fixed up his income tax blank. Tom Ray died, so because of death can't speak, why that was a pretty good deal.



Now this morning we introduced exhibits numbered 20 and 21. These were prepared by Mr. Tom Ray, the attorney. If you recall the stipulation, we stipulated that he was an old-time attorney here in Tacoma, and he died some time, I believe, in 1944, and his records have been scattered so we couldn't get to them. These are income tax returns prepared by Tom Ray, and let's see what Tom Ray says in his own handwriting. He's not here to speak for himself. On Exhibit [461] No. 20, which is the income tax statement of John and Katie Barcott for the year 1938, it is signed by Thomas Ray, and he inserts this, and you will have it in the jury room to see it—he inserts this right here: "I swear that I have prepared this return for the person or persons named herein." Then he inserts "from figures given me" and that the return and so forth, and then signs his name.

Nineteen thirty-nine is the next year. He prepared this income tax return again. And what does he say on the back of it? He is not here to speak for himself. The same thing, Thomas Ray, who wrote in merely—he uses the word "merely," which I think is rather odd, who wrote in merely the figures John and Katie Barcott gave him. Now there is Tom Ray's testimony as against Mr. Barcott's as to whose figures these are, and how these income tax returns were made. They were the same sets of paper.

Then we also stipulated another piece of testimony that the income tax for the year 1945, after he was under investigation. Mr. Ursich, attorney



at that time, instructed him to add another \$1200. He was under investigation now, and came in with the same slips of paper just about the time he was going to get out from under this deal and sell out to his son and so forth. You will [462] have this in the jury room with you. Look in here, it says "From other sources, miscellaneous, \$1200." Just to add \$1200. on to the thirteen hundred—thirteen thousand. Where did he get it? Why did he do that? Why did he do that at the time of the investigation? Why did Mr. Ursich feel he had better add some more on here? There might be some mistakes, so they add twelve hundred on. Did they think there might be a lawsuit? There might be something in court some time? Better show that we were going to give some more here, because we think we might be under a little bit. Isn't that a lawyer building a case before you have to go to court, before a man is even indicted—before there is even a lawsuit started. Getting something ready to show to you people at some time, why we just handed the government a statement that we are twelve hundred dollars. We don't know but we just want to be sure so we gave twelve hundred dollars, but after they were under investigation.

Do you recall Mr. Bareott's testimony on the stand? He said that he had about \$60,000. He doesn't know how much exactly, but about \$60,000, in 1940, in cash. That was his statement. Now does it sound to you that that could be true? Here's a man that says he has about \$60,000 in cash in 1940.

Do you recall all the conditional sales accounts that he had during those years [463] of small amounts, too. Electric heater, or electric stove for his home. That was about 1938. Paid it off with the interest on conditional sales contracts. In 1940, equipment \$101. Hobart Manufacturing, 1942, \$306. \$1939, \$66. 1937, furniture, \$448. Household equipment, electric company, 1938, does it seem to you that a man who has \$60,000 in cash is going out here and signing a conditional sales contract and paying interest on money? A man that likes money as much as Barcott does? It's ridiculous to try to tell people that he had this cash in there; that he couldn't have paid for these things and saved that interest. He'd do it. They told you how frugal they are. Why they buy shoes at fifteen and twenty cents a pair. You heard that testimony. They were buying that about the time they took the trip to Europe, too. Well, a person that is frugal, do you think that he is going to go down here and leave cash money in a box and go out and pay small amounts of interest on conditional sales' contracts? Is that logical?

Then, back in 1932 or '3 he signed a note. He signed a note up in—for \$200. I believe it was, with the Fisherman's Packing Corporation on stock—18 shares of stock, and he didn't pay that \$200 off, and in 1940 at the time some of the conditional sales contracts were on, they cancelled the note and cancelled out four shares [464] of stock, and with less than 30 days after they cancelled out that note of \$200 they paid a 10 per cent dividend. You heard that testimony. Do you think a man is going to

conduct affairs that way that he's going to turn down that dividend and not have that stock, and since then they have been paying 6 per cent? Why these government bonds, what does he make, two and a half per cent? Why it is ridiculous to think that he had \$60,000 in cash in 1940.

And how did he conduct his business? You heard the testimony that when they checked the cash sales against the register. What was his method of doing business? He destroyed the sales slips that he bought things with. He destroyed the cash register tape. He destroyed all those things. He never kept any books. That's one of the duties of anyone that runs a business, has, is to keep some kind of accounts. And the difference between the amount they took in and the amount that was in cash was different. Over a two-weeks' period of time, if you recall, it ran all the way from about two dollars to fifty-seven dollars. And what was Mr. Barcott's statement? Somebody was dipping in the till. They all go into the till, and so they are short that much money. Well, I think that's true. I think somebody was dipping in the till, and I don't think we have to look farther than Mr. Barcott to find who was dipping into the till, and that cash went into that safe or some place else, and that's how the money was accumulated.

And then, he says, "I was getting so much stuff together, that I had to use two safe deposit boxes." Now this was back in 1942. He had to have two safe deposit boxes because the one in the National Bank of Washington wasn't big enough, but after

he got the second safe deposit box, what did he do? He bought all these bonds and added these bonds and these things to the first box which was so crowded at one time that he had to have a second box. If that were true, why didn't he have to have a second box in 1940 when he said he had \$60,000 in cash? Can you believe a story like that? This man claims he had \$60,000 in cash in 1940. If that were true, he deserved to have two safe deposit boxes in 1940, and not 1942, and actually what he says is true. In 1942 he needed an extra safe deposit box to take care of the cash he was taking out of that register.

How would a guilty man act when he's started to be investigated? Stop and think about that a moment. Don't you think a guilty man would act something like Mr. Barcott did in this instance? He got excited. I think he is a person that naturally would get [466] excited over any kind of an investigation. Most of us do. I do. Anybody does. But don't you think that a guilty man would act a lot like Mr. Barcott has? He told Mr. Nielsen on the first interview all his sources of income, and what was his story? He says, "Well, I'll tell you, the reason I have all this cash is that I save up a few thousand dollars and I go out and buy bonds." Remember that was his story to Mr. Nielsen. That's why he had this cash on hand, because when he saved up a few thousand he went out and bought bonds. When did he buy the bonds, if he was saving up a few thousand and going out and buying bonds? He did it in '42, '3, '4. and '5. That is

when he was saving up these few thousand. It isn't as he now comes in and says "I had this money all the time, and I was patriotic. When they called upon me I went into my safe deposit box and brought out this money and bought these bonds." No, when he was first investigated, he told Nielsen "I save up a few thousand go out and buy bonds." And he didn't deny that when he took the stand. He didn't deny that. You remember Nielsen's testimony. That was it. And I think that's true. He would save up a few thousand in cash; he'd go buy bonds. But when did he do it? During these war years.

Then the story which has nothing to do— [467] the story about what he tried to do to Nielsen, about buying off a government agent, hasn't anything to do with this case except to show some intent on somebody's part. Why do you think Nielsen would tell a story like that if it weren't true? In whose interests would Barcott deny it? In his own. Naturally. He is the interested party in this case. Are you going to say that Mr. Nielsen came up and perjured himself to you? Lie to you? Or is it more logical that Mr. Barcott was the one from what you have seen here who is not telling the truth about that transaction? Are you going to come back in here and tell Mr. Nielsen that he is perjuring himself to you, this government agent who has been working for years on this type of thing? He came in and did his duty.

Mr. Gagliardi: I want an exception to his argument along that line, your Honor.

The Court: Exception will be noted. Proceed.

Mr. Pomeroy: Now, all right, he went down with Nielsen to his safe deposit box. He didn't tell Nielsen anything about the second safe deposit box at that time. He didn't say a word about it. Here are the records, and he couldn't explain why he went back the second time to that other safe deposit box, [468] either. At 11:00 o'clock—you will have this in your jury room—at 10:55 a.m., Barcott went into his on January 28th—that's when he and Nielsen went into that safe deposit box, and they were there quite a little while. You will recall Nielsen was taking down and making an inventory of all the various bonds and things in that box, and here are the slips that will also be in the jury room with you of the Washington Safe Deposit Company. He went in there—and Nielsen didn't know anything about this box—he didn't disclose it, at 12:45 p.m. on January 28th. That is, they went in at 11:00 o'clock and they were there for some length of time and at quarter to one he was over in this box. Two weeks later, approximately, or a little better, February 13th, there was nothing in this box except insurance papers, but after running over there, for whatever he ran over there for—I don't know, he says it was full of insurance papers and deeds, he goes back the next morning at 9:02 a.m.—he must have waited for the doors to open. There's the slip. Now what did he go back the second time for? You remember how he acted on the stand when I asked him why he went back. He never has ex-



plained why he went back on that, but he did say in his direct testimony that he never disturbed the contents of that box on February 13th. Well what did he [469] go back for? Was there more money in that box? Why was he so anxious to get over there in a hurry? He never has explained that to you, in any way. He hasn't even attempted to. He says "I don't remember"—"I don't know."

Now ladies and gentlemen I think that—leaving the case with you I think you recognize that during the war years the California Oyster House and the type of business that you know it is, from the testimony that you have heard here in Tacoma, some of you aren't from Tacoma and some of you are. You probably are familiar with the place, but you know that the shipyards were running at great capacity here in Tacoma; that you had over a hundred thousand men over at Fort Lewis. The Navy was here. A lot of war contractors, and the lumber mills were running to capacity. It was big business in Tacoma, and it was the time that Barcott made this money. People were lined up, I imagine, to go into that California Oyster House.

In the instructions also, the Court will advise you that you can't find this man guilty unless you find he is proven guilty beyond all reasonable doubt. To those of you who have never heard that instruction before I ask that you listen to it very carefully. I have never heard the argument of counsel, but the usual [470] defense argument is that "don't you have any doubts"? "There must be a doubt." The Court will instruct you as to what a reasonable



doubt is, and I think the Court will instruct you something along the lines that it isn't proof beyond all doubt, but it is proof beyond a reasonable doubt. When you are satisfied in your conscience and it has been proven to you to a moral certainty the guilt of a party, and you are satisfied in your heart to your moral certainty that a man is guilty, then he is guilty and is proven guilty beyond all reasonable doubt. I want you to pay strict attention to that instruction because I am sure as most defense attorneys do, they will argue a reasonable doubt to you, and the instruction is very important.

The American people are—it's the American conscience in these income tax matters. It's—our income tax system is set up on a system of faith and trust. You and I—all the American people, we go and are permitted to make out our own income tax returns. They are seldom questioned. It's the way we have of conducting our business, and those of us who honestly try—honestly try to put in a correct income tax, none of us like cheats, or liars about those things because our system of government is standing the test of time today. You and I know, when we see these hearings on communism back in Congress today. [471] We hear about what is going on all over the world, and our system of government today is standing a test. We are being tried. If people feel that you can walk into a court room like this and walk out and get away with what this man did, they don't believe in our system any more.

Mr. Gagliardi: I object to counsel's remarks as improper and prejudicial and not called for, and not supported by the evidence, and as appealing to the passion and prejudice of the jury, and I am excepting to his argument, your Honor.

The Court: The last remark of counsel the jury will disregard.

Mr. Pomeroy: This is an important case. It's important to the government and it's important to Barcott. Other taxpayers are watching what you and I do. When you stood up in this jury box you swore to do your duty as a juror. When we took this case we took it and swore to do our duty as we saw it, and I say to you, ladies and gentlemen of the jury that—let us do that duty. Let us do that duty as we see our conscience clear to do it.

(Whereupon, argument by counsel for the defendant.) [472]

Mr. Pomeroy: If the Court please, counsel, and ladies and gentlemen of the jury:

Mr. Gagliardi brought up the fact that I objected to the introduction of this piece of evidence, which is self-serving. I am sure that the Court will probably state to you that that is a matter of law as to what is given to the jury and what is not. What is admitted into the evidence, let us put it that way, and because he has spoken of it I will stop for just a moment to say that this statement was not admitted here, because of the fact that under law a man who makes a self-serving statement can not use that same statement to further his own case.

You do not have a report in from the government agent. Neither do you have this one, but you have your recollection of the testimony as it was given to you.

Counsel have been very complimentary to me. For some reason they wish to scare somebody about the fact that I happened to come over from Seattle and prosecute this case, and I would like to say now that they have three excellent attorneys on their side and this has been a very difficult case for me. The only reason I am here is that our office is crowded and is busy, and the idea of praising me so highly is not because they actually believe that, but are trying to [473] becloud the issue with you, to the effect that I am likely to say something in some magnetic way that I can get convictions which are not true.

The question was brought up about bringing Mr. Plancich down from Anacortes. He was not brought here to prove any dividends. He was brought here to prove to you the transaction regarding the boat "Ranger" and the number of shares of stock in the Fisherman's Packing Corporation, and that was his testimony if you will recall it. It was not for the purpose of showing how much dividends. We already had that figure.

We were criticized by counsel—by both counsel for the fact that we do not present to you all the various income tax reports way back over the years. I am sure that counsel have probably forgotten it, but there is an act of Congress which had destroyed all of the reports prior to 1938. There are none

in existence of yours and mine or anyone else's. If they knew about that law I am sure they wouldn't have made that argument, because we can not present something that was destroyed by act of Congress.

The—counsel have been talking about this book. The only thing I can say about this book is he had to make his 1946 report—1945 report from the book as it was, because these figures in here have already been put in here, and this book had been shown to the agents. There was no way then to change those figures, and I submit to you when you take this into the jury room remember the testimony where we had it totalled up for your benefit; that after this investigation these receipts jumped up practically two thousand dollars a month. If you will go back through this book you will find that after the investigation started that book jumped nearly two thousand dollars a month, and we took month by month and tried to get them totalled for you, and because of the fact that Mr. Bareott did not have his glasses here, it was impossible for him to do it, and we had to present the figures to you, but it was \$8500 in that month, the previous time was sixty-five hundred. If you recall, that is the testimony and you can get those figures yourself out of that book.

The only reason that Tom Ray's name came up was because of the fact that it was felt by us that responsibility was apparently being pushed on to him for making these income tax returns and that is why these income tax returns were brought here

to show that he qualified what he did. He said "I'm just putting in here the figures that are given to me," and I will also remind you about this book which I have just shown you, that the one that I was asking about, the previous book, [475] he testified he didn't ask for until 1946, last year. Tom Ray had been dead two years then.

Counsel is quite flattering to you, too, that you knew all about criminal cases and referring you to the Capone case and a few others, and talking about the small things that were brought up by the government in this case. That is the only way we can present everything to you. We try to bring you everything that we know about it. The interests, for instance, from Anton Barcott; the appointing of Mr. Knaga and the caliber of the government's testimony. I didn't bring Mr. Knaga here. That isn't the government's testimony. That is their own testimony. Those people are witnesses that we didn't call. They brought them here themselves.

Another argument that counsel makes is to the effect that—I think, the two of them have probably taken their notes down incorrectly, because as I understood Mr. Hale's statement was to the effect that the government tried to say that Mr. Barcott was penniless on December 31, 1942, and then when Mr. Gagliardi gets up, he says that they admit they had \$57,000. Well Mr. Gagliardi is correct in that and Mr. Hale is mistaken, because we never have said that he was penniless at any time. He has always been given credit for having so much money, and of course we believe much more than he has [476] been given credit for.

Another argument that was presented here I think was misunderstood somewhat, and that was my argument concerning the conditional sales contracts. That's true what they say, sometimes we buy something on conditional sales when we have money in the bank. I do it, you do it, and we all do it, but that isn't exactly my argument here. My argument on that point is this: here is a man that says "I have \$60,000 in the bank, cash," not drawing interest—not doing anything, just laying in a safe deposit box, and who is so penurious, so frugal that he doesn't want to pay out more than fifteen or twenty cents for a pair of shoes that his family testified to, but still he goes and doesn't take a nickel out of his safe or out of that safe deposit box, but pays interest on these conditional sales contracts. That's not the same thing as you or I having a thousand dollars in the bank and going out and buying something on conditional sales contract because we don't want to use up all our ready cash. This man, if his story was true, had so much cash he didn't know what to do with it.

In the tips we have talked about, the proposed testimony of Mr. Gagliardi that the average is five dollars a day, I don't know. I never heard that before. It's not evidence. You were told to disregard it, [477] but it certainly was not true back in the days when Mrs. Barcott was working. That was in the middle of the depression—the latter years of her work, so if there is such a thing now, it certainly is entirely different than it was back there, and that lady I think testified correctly that



she couldn't say how much she got prior to 1936. After that it was not a low of three and a high of five.

Ladies and gentlemen, I know we probably talked you out and talked too long. The only thing I can say to you is this, that I think the facts are present for you to bring in this verdict of guilty. If the whole family were working as he said, if every one of them gave all their money to Mr. Barcott as they say, if they never spent a dime for living expenses, they still can't explain these figures away, and when he brings up this piece of paper here that this young accountant brought up here, even his statement is an understatement of \$43,000. It also shows an increase of \$7,000 in cash, and the Court will probably instruct you that when you find there has been a substantial evasion, even though it's not the exact figures in the indictment, that then that is sufficient to bring in a verdict of guilty and I am sure that from the testimony that you have heard, that you know beyond any reasonable doubt, that this man [478] has made a wilful and substantial evasion of income tax.

The Court: Now ladies and gentlemen of the jury, both sides having rested and counsel representing the Government and counsel representing the defendant having made their arguments, we have reached that stage in the case where it becomes the duty of the Court to charge you with what the law is.

In the course of this charge, and I shall read a part of it, I may make some reference to what the evidence was. I may say something that might



indicate to you what I think are the logical inferences to draw from it. I do not intend to do so, and any reference that I make to the evidence will be only for the purpose of making it easier for you to understand the law.

The Court, in a Federal case, has the right to comment on the evidence, to sum up the testimony of the witnesses on both sides. I do not intend to do that in this case, but I do want to impress upon you the importance that you have and your responsibility of determining what the facts are, and likewise what the evidence was.

Counsel have been at some substantial variance here in their arguments as to the evidence. [479] I think they—all three of them, explained to you that you did not have to accept their recollection of what the evidence was, and I instruct you now that you do not. You have to depend upon your own recollection of what the evidence is. Any comment that I might make concerning the evidence, you would not have to accept it, because that is not my responsibility. My responsibility is to correctly state to you what the law is in a case of this nature. Yours, as a member of this court, is to determine what the facts are, and neither of us are concerned with the particular individuals involved, but we are deeply concerned in ascertaining what the truth is, what the facts are, and how we apply the law to a particular set of facts, so I do not want to invade the province, and you will understand from what I have said in the way of preliminary, that I

do not intend to invade the province or responsibility of the jury, and I am going to refer now to this indictment.

The indictment in this case contains three counts. The case is what we call a criminal case, and the indictment is a document that has been returned by the grand jury in this court, and it charges in Count I:

That on or about the 12th day of February, 1944, at Tacoma, Washington, John Barcott, [480] late of the City of Tacoma, State of Washington, who during the calendar year 1943 was married and had no dependents, did wilfully and knowingly attempt to defeat and evade a large part of the income tax, and victory tax, due and owing by him to the United States for that calendar year, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Washington, at Tacoma, Washington, a false and fraudulent income and victory tax return wherein he stated that his net income for the calendar year, computed on the community-property basis, was the sum of \$6,720.40, and that the amount of tax due and owing thereon was the sum of \$1,545.00, whereas, as he then and there well knew, his net income for the said calendar year, computed on a community-property basis, was \$12,406.00.

And I might explain to you that means one-half of the community income, because the income is divided, and that he reported that he received a hundred and forty dollars in dividends and a hundred and forty-one dollars and some cents in inter-

est, or in—yes, in interest, and then interest on bonds, two hundred dollars, and income from the business, twenty-four thousand, six hundred and twenty-one dollars, or a total of twenty-five [481] thousand, a hundred and three dollars. And then there were certain deductions—contributions, two hundred dollars, and ninety-one dollars and twenty-three cents taxes, leaving a net income of twenty-four thousand, eight hundred twelve dollars. This was a community income, and the amount we are concerned with here is just one-half that sum, or twelve thousand, four hundred and six dollars.

And the charge is that instead of making a return and payment upon said basis, where he would have owed an income and victory tax of \$3,646.25, he made one as I have already indicated.

Now, Count II. It reads very much the same except it eliminates this matter of victory tax, which was not in force in 1944.

And Count III deals with the year 1945; and it eliminates likewise, this victory tax.

Now each of these counts constitutes a separate and distinct offense, and each must be considered by you separately and distinctly. The fact that you may find guilt on the first count would not imply that guilt exists as to the other two counts; and, likewise, that you may find that the government has failed to prove guilt on the first count would not imply that it has failed to prove guilt on the other counts. You must [482] consider each count separately on the question of guilt or innocence of the defendant.

The indictment in this case, must not be considered by you as any evidence of guilt. It will be submitted to you for the purpose of more fully—of giving you an opportunity to more fully understand the charges that the Government makes. And you will therein find, as I have already indicated to you, a more detailed statement of the figures, which the Government claims were falsely represented by the defendant in connection with this charge.

Now, to this indictment, the defendant has entered a plea of not guilty, which puts in issue each and every material allegation of the indictment.

You are instructed that the defendant is presumed to be innocent of the crime with which he is charged, and that presumption attaches to and continues with him throughout all stages of the trial, and throughout all the stages of your deliberations, until it has been met and overcome by competent evidence and beyond a reasonable doubt.

This presumption is a part of the law of the land, to which the defendant is entitled; and unless this presumption is overcome by the evidence in the case [483] beyond a reasonable doubt, you must acquit the defendant.

And, as I have already indicated to you, the fact that an indictment has been returned against him is no proof of his guilt. It is merely a formal instrumentality of bringing him to court for trial. His guilt must be proven independent of the indictment.

Now you are instructed the burden is on the Government of proving every fact material and necessary to a conviction by competent evidence

beyond a reasonable doubt. It is not sufficient that the Government should prove these facts by a mere preponderance of the testimony, nor, on the other hand, is it necessary that he should prove them conclusively or in such manner as to leave no room for any doubt whatever. Very few things in the whole domain of human knowledge are susceptible of absolute proof. We can have a moral certainty or a reasonable certainty, which may vary in degree, but rarely an absolute certainty.

The expression "reasonable doubt" means in law just what the words imply—a doubt founded upon some good reason. It must not arise from a merciful disposition or a kindly, sympathetic feeling, or a desire to avoid performing a disagreeable duty; it must arise from the evidence or lack of evidence. It must not be a [484] mere whim or a vague conjectural doubt or misgiving founded upon mere possibilities; it must be a substantial doubt, such as an honest, sensible, and fair-minded person might with reason entertain consistent with a conscientious desire to know the truth.

You must use your common sense as men and women of experience and possessing some knowledge of worldly affairs, and if, after examining carefully all of the facts and circumstances in this case, you can say and feel that you have a settled and abiding conviction of the guilt of the defendant, then you are satisfied of his guilt beyond a reasonable doubt. If you have not such a conviction, then you should acquit him.

Now each count of the indictment, that is Counts I, II and III, is brought under a section of the Internal Revenue Laws which reads as follows:

“ \* \* \* any person who wilfully attempts in any manner to evade or defeat any tax \* \* \* or the payment thereof” \* \* \* shall be punished.

The essential elements of the crime charged in the indictment herein are three, as I set them out. The first is, that the defendant owed more income tax than shown on his return during the taxable year charged. You must find that fact before you proceed with the next. Second, that the defendant knew that he [485] owed more income tax than shown in his returns. Third, that he wilfully attempted to evade or defeat any part of such tax by filing a false return.

If you find the existence of each of these elements beyond a reasonable doubt as to each count or counts which you so find, you should find the defendant guilty as to such count. If you have any reasonable doubt as to the existence of any of these elements, you should acquit him as to such count or counts.

Let me repeat, before you can find the defendant guilty as to any one of the three counts here charged, you must find beyond a reasonable doubt that the Government has established each of the foregoing elements as I have outlined them to you. If you entertain any reasonable doubt as to the existence of any one of these elements, in any one of the three counts, then you will acquit him as to such count or counts where you entertain such reasonable doubt.



We are here trying the defendant on three separate and distinct charges, similar in nature but covering different periods of time. It is necessary, before the defendant can be convicted on any one of these three charges, that the Government must have proved to [486] your satisfaction that he owed more income tax than shown in his return during the taxable year charged; that he knew he owed more income tax than shown in his returns; and that he wilfully attempted to evade or defeat any part of such tax by filing a false return. That is merely a repetition of what I heretofore stated to you.

You are instructed that the Government is not obliged to prove an attempted evasion of the entire amount of the tax as alleged in the indictment; it is sufficient that the government has proven beyond a reasonable doubt that the defendant attempted to evade any substantial portion of the tax liability for the years here in question, and not for any prior years.

The indictment, as an essential element of the offense charged, involves criminal intent. The indictment uses the word "wilfully" in charging the acts and things alleged to have been done. You are instructed that the term "wilfully" as used in the law and applied to this case, includes some element of an evil motive, and a want of justification, in view of all the financial circumstances of the taxpayer as shown by the evidence.

The intent with which an act is done is an act of the mind, seldom, if ever, susceptible of proof by direct and positive evidence. It is to be arrived



at by such just and reasonable deductions and [487] inferences from all of the surrounding facts and circumstances, and from all of the evidence in the case, as the guarded judgment of a careful and cautious man or woman would ordinarily draw therefrom.

It is not necessary to prove that the tax was due and was actually evaded, but it is necessary to prove that there was a wilful and positive attempt to evade the tax, in any manner, or to defeat it by any means.

So, in this case, in order to find the defendant guilty of any of the three charges contained in the indictment, you must be satisfied beyond a reasonable doubt that he wilfully attempted to evade the tax, or some part of it, which was due the Government and that there was an intent upon his part to commit the offense alleged.

You are instructed that, if you find from the evidence that the defendant committed or attempted to commit some other offense other than the one charged in the indictment, such finding does not justify you to find the defendant guilty of the crime charged in the indictment. And the Court is here making specific reference to the testimony of the witness, Mr. Nielsen, the Government witness who testified as to an attempt [488] to bribe him, and the refutation of that testimony by the defendant himself, that you, in weighing and considering the testimony of these two witnesses on that issue, conclude that the testimony of Mr. Nielsen stands up and is entitled to belief over that of the defendant,

then you could consider it, because the Court has held it to be competent testimony, but you could not say that fact establishes the ultimate fact in this case. Such evidence standing alone cannot establish guilt. It is submitted to you as a circumstance only, which can be considered with other facts and circumstances in determining the guilt or innocence of the defendant, and for no other purpose. Or, if you believe the testimony of the defendant over and against that of the witness, Nielsen, then you should disregard the incident entirely in weighing and considering the ultimate verdict.

Now it is not incumbent upon the Government in a case of this nature to prove that the defendant attempted the evasion of the entire amount of tax involved in the case, but it is incumbent upon the Government to prove beyond a reasonable doubt that he attempted to evade a substantial portion of the tax liability as set forth in the indictment.

You are further charged that it is not incumbent upon the Government to prove that it lost any tax as a result of the filing of the returns, but it is incumbent upon the Government to prove beyond a reasonable doubt that the filing of the returns contained [489] false statements or representations knowingly and wilfully made with the attempt to evade the payment.

I have stated to you that wilful intent is an essential element required to be established before you can convict the defendant of the charge contained in the indictment. You must, therefore,

find beyond a reasonable doubt that there was a wilful intent on the part of the defendant to evade his income tax, or some part thereof, for the years '43, '44, and '45; and you must likewise find that there was a wilful intent to make false and fraudulent statements as charged in the indictment. In other words, you must be satisfied beyond a reasonable doubt that there was on the part—on the part of the defendant a wilful intent to commit the offense charged in the indictment; and in determining whether there was such an intent, you will give consideration to all of the facts and circumstances as shown by the evidence in this case.

Now the evidence is divided into two classes: first, positive and direct evidence; and second, circumstantial evidence. Circumstantial evidence is quite as competent as direct evidence when certain rules are applied to its weight and consideration, and I think in this case that the Government relies upon circumstantial evidence to establish the [490] income of the defendant as being greater than that shown by his tax returns for the years in question here, 1943, '44 and '45.

It calculated the net worth of the defendant at the close of the tax year of 1942, and the beginning of the tax year 1943, and then, calculating from that basis, as a net worth, at the close of each of the succeeding three years, it charges the defendant with earnings as evidenced by the increase in his net worth for each of these years. The Government therefore relies upon the fact that when such

an increase is shown, it has established circumstantially that such income was taxable income and was acquired by the defendant in each of the years 1943, '44 and '45.

Now an essential element of the offense herein is that the defendant's taxable income was greater than that which he reported. If such fact is not proven, then you would find the defendant not guilty.

If you find from the evidence that the increased net worth of the defendant in the years in question here measured the taxable income of the defendant in a substantial amount over that reported by the Collector—by him to the Collector of Internal Revenue, such fact would be one of the essential elements in the charge which the Government makes. You would [491] then consider it together with all of the other facts and circumstances given in evidence in this case, and then determine whether his actual taxable earnings during the years '43, '44 and '45, are established by the evidence to your satisfaction beyond a reasonable doubt when measured by the net worth at the beginning and ending of the year.

If you are not satisfied from the evidence that the difference shown between the beginning and the ending of the year—of the taxable years in question results in a sum substantially greater than that actually reported, then it would be your duty to acquit the defendant.

In considering this matter, the defendant—in considering this matter, if you can reasonably

account for the increased net worth of the defendant from the beginning to the end of the year upon any reasonable theory or hypothesis that will admit of his innocence, it is your duty to do so and to acquit him.

The Government, under the evidence submitted in this case, must satisfy you beyond a reasonable doubt that all of the facts and circumstances upon which it relies are true, but they must also be such facts and circumstances as are incompatible on any reasonably hypothesis other than the guilt of the accused. [492]

If the testimony in this case and its weight and effect can be such that two conclusions can reasonably be drawn from it, one favoring the defendant's innocence and the other tending to establish his guilt, the jury should adopt the former, which favors innocence, and find him not guilty.

Now that's the rule of circumstantial evidence.

The jury are the sole judges of the facts in the case, as I have already indicated to you. You are also the judges of the credibility of the witnesses, and of the weight and the value to be given to their testimony.

Now in determining as to the credit you would give to a witness, and the weight and the value you would attach to his or her testimony, you may take into consideration the conduct and appearance of the witness on the stand; the interest of the witness, if any, in the result of the trial; the motive actuating the witness in testifying; the witness' relation to or feeling for or against the plaintiff or defendant, as the case may be; the proba-

bility or the improbability of the witness' statements; the opportunity that the witness had to observe or to be informed concerning such matters respecting which the witness testified to; [493] and the inclination of the witness to speak truthfully, or otherwise, as to the matters within the knowledge of such witness.

Now all of these matters being taken into account, together with all of the other facts and circumstances given in evidence, it is your province to give to the testimony of each witness such value and weight as you deem proper. If, upon the consideration of all of the evidence, you conclude that any witness, irrespective of what his or her motive might have been, has wilfully sworn falsely as to any material matter involved in the trial, you may reject or treat as untrue the whole or any part of such witness' testimony, except insofar as it may be corroborated by other credible testimony in the case.

In this case the defendant has seen fit to take the witness stand in his own behalf. That's his constitutional right, if he wants to do so. When he does, he is judged by exactly the same standards that the other witnesses are, as I've indicated to you, except for the further consideration of the deep personal interest that he has in the outcome of the case.

Now you will not single out any one of these instructions in returning your decision, but rather you will consider them all together and as a whole. [494]



I feel that I should say a word to you concerning the document that has been referred to by both counsels. The matter contained in the document will perhaps be substantially covered by all the testimony of the accountant who drafted it. The document itself, however, contained matter that the Court felt as a matter of law, was not competent to go to the jury. And therefore you, in your deliberation, will give no concern to what counsel on either side may say was in that document; but the Court rejected the offer, and when any offer of evidence is made, in either a civil or a criminal case, and the Court rejects it, that should be the end of it so far as the jury is concerned. The judge has the responsibility if he has made a mistake on the law, and it can be corrected by a higher court; but when you determine a fact, there is no particular provision made for correction of your determination on facts.

However, you must not base your facts upon things that have been excluded. What I have said about this single document applies to all of the offers of proof and the rejections, and likewise applies to the arguments made by counsel on both sides, where the Court might have interrupted them. Those are all things [495] that come within the hearing of the jury, but actually are of no concern to the jury, and there have been instances already in this case and there will be others where we have to send you out and then bring you back again before you have the case finally fully submitted to you.



Now, when you retire to your jury room to deliberate upon your verdict, it will be your duty first, to select one of your number as foreman, who will speak for the jury when called upon by the Court to do so, and who will sign your verdict when it has been agreed to. No verdict can be returned in this case except by the unanimous finding of all twelve of you.

The Clerk has prepared a form of verdict. This form of verdict lists the counts in the indictment and the name of the defendant, and it reads, generally, in this form:

“We, the jury empaneled in the above-entitled case, find the defendant, John Barcott,” and then there is a blank, and following the blank, the words, “Guilty as charged in Count I of the indictment,” and the same as to Count II and the same as to Count III.

If you find the defendant guilty on any of the particular counts, it is unnecessary that you [496] insert any words in the blank space.

If you find the defendant not guilty on any count, you will then put the word “not” in the blank space before the word “guilty.” If you find the defendant guilty on some counts and not guilty on others, you will make the proper entry.

Now you will have with you in your jury room a copy of the indictment, and I repeat again what I said at the outset, the indictment is not evidence itself. It is merely for the purpose of making plain to you the nature of the charge. You will have

with you, however, in your jury room, all of the exhibits which have been offered in evidence and which are admitted and which are for your consideration.

I am going to give you this suggestion: you can either take it or reject it as you see fit, but only in the hope that it might aid you in expediting your deliberations. First, I want to say that no juror is expected to give up a firm conviction and surrender to other jurors. Neither is any juror supposed to take an attitude that is adamant and decline to listen to reason. So when you get into your jury room and have organized the jury by the selection of a foreman, before a ballot is taken in a case that has taken several days to try, my suggestion would be that you seat yourself around the [497] table, with the foreman at the head of the table, and starting out on the right or left—I suppose depending upon whether he was a right-handed person or a left-handed person, go to each juror and let them express their views briefly and such things—go around the table in that manner. That will bring into the discussion the various exhibits. And then see how their differences might be reconciled, and take a ballot.

Now you are not being compelled to follow that procedure, but I have found that it does aid in making a disposition of a case. If your ballot indicates a difference of opinion, then the wise thing is to cross that ditch in a kindly, friendly manner, objectively, and without any private opinion, because jury service is not for the purpose of vetoes and walking out on affairs.

I have unfortunately had jurors in years gone by, where they would divide fairly equally or rather, one sidedly, and one group would get over in one corner of the jury room and the other group get over in the other corner and they would have nothing to do with each other any more. Well, that isn't the purpose we bring you in here, and neither the defendant in this case nor the government, nor any of us, want that, and I am sure that the unusual attention that you have displayed during the progress of this trial—certain features of which [498] are somewhat complicated because they involve figures—that you are going to make a like effort to ascertain what the truth is by a collective judgment of twelve of you.

Now let me say to you in conclusion: You have each taken a solemn oath that you will well and truly try this case and a true verdict render upon the evidence in the trial and upon the law as given you by the Court. You have nothing whatever to do with the punishment to be inflicted in case there is a violation of the law. The fact that punishment may follow a conviction cannot be considered by you, except insofar as it may tend to make you careful.

As stated to you in the opening of this charge, you must not allow yourselves in the least to be moved by sympathy nor influenced by prejudice.

The question of guilt or innocence is a question of fact, not a question of prejudice nor what shall the punishment be. If, as a matter of fact from the evidence the defendant is guilty, no amount of

sympathy will make him innocent. If the defendant is innocent, no amount of prejudice would make him guilty, for regardless of what the penalty may be, regardless of any feeling of prejudice or sympathy, the defendant is, upon the evidence and the evidence alone, either guilty or not guilty. Now what is the proper verdict, as shown by the evidence, is the one question before you.

The court: Any suggestions, Mr. Pomeroy?

Mr. Pomeroy: I have none, your Honor.

The Court: Mr. Gagliardi, do you?

Mr. Gagliardi: I have none, your Honor.

The Court: Very well, the jury will retire to the jury room to deliberate on your verdict, and I might state to you that I will be subject to call until 10:00 o'clock tonight. That does not mean that you should take that much time, but then I am just advising you that if you haven't a verdict then, we will have to consider whether we will put you to bed.

(Whereupon, jurors retire to deliberate upon their verdict) [500]

November 24, 1947. 10:00 o'Clock A.M.

The Court: Docket 15845, United States vs. John Barcott, a motion for new trial. Are the parties ready?

Mr. Ursich: Yes, your Honor. If your Honor please, our motions in this case are for a judgment notwithstanding the verdict or a motion for a new trial. In the alternative for a motion for a new trial, our chief grounds of contention for a

judgment of acquittal, if your Honor please, is the failure of the Government to make out a case, according to the indictment and as limited by the bill of particulars.

In commencing any argument in this nature, I feel that it doesn't hurt at all to go back to the sixth article of our Federal Constitution, where it states that the accused shall be informed of the nature and the cause of the accusation. Now, throughout our entire history, if your Honor please, this has meant that he shall know what he is charged with and he does not have to defend himself against anything except that with which he is charged. Under this system we have a right to rely upon the allegations of the indictment and the bill of particulars, and if [501] the Government does not prove the commission of the crime in the manner in which it has charged, it has failed in its proof, and acquittal should be ordered for the defendant.

Now, according to the indictment, as clarified by the bill of particulars in this case, the defendant was charged with failing to report certain dividends, certain interest, and money which he received from a business known as the California Oyster House, during the specific years '43, '44 and '45. Being thus specifically informed, he entered a plea of "Not Guilty," throwing the burden directly on the Government to prove that which they said they were going to prove. They had to prove a failure to report interest during one of those three years, or all of them; they had to prove a dereliction in the reporting of the interest; they also had

to prove that the defendant defrauded the Government by failing to report a portion of his income from the Oyster House. Now that's what they had to prove. That's what the defendant came into Court ready to defend——

The Court: I don't think we need to waste any, or put in any time on that argument at all, Mr. Ursich, because the Court is not in accord with your views. [502]

Mr. Ursich: I feel that your Honor was in the commencement, and I feel now——

The Court: The bill of particulars is not the indictment or part of the indictment, and it does not modify and cannot amend the indictment.

Mr. Ursich: No, your Honor—but I——

The Court: And the offense charged here, the specific offense is a wilful attempt to evade the payment of income tax; and whether that tax was interest on bonds, or what not, if the proof is that there was any of it—any substantial amount of tax sought to be evaded, why the case is made.

M. Ursich: If your Honor please, I have a few citations on the bill of particulars. I don't know whether your Honor wishes to hear them or not.

The Court: Not unless they come within this new rule.

Mr. Ursich: I will say this on the new rule, I have examined it rather thoroughly and I find the comments on that, the committee comments, that the rule—there has been no substantial change in the rule, relative to bill of particulars. And I found no cases which state that once a bill of par-



particulars has been given, that the Court may thereafter disregard the specific statements set forth in the bill of particulars, and then go back to the general allegations of the indictment. I haven't found any, if your Honor please.

The Court: Well, do you contend that if there was a failure to prove that there was interest on bonds that then there was a failure of proof in this case?

Mr. Ursich: No, your Honor, I don't. I contend this, that there—as far as interest on bonds were concerned, there was no proof. The Government itself admitted that. And on dividends there was no proof of failure to report. That was admitted. The facts then came down to a failure to report income from the business, a specific business, the California Oyster House. Now that's what the case hinged on. That's what we came in here to defend. Then when we come in here they throw a net worth theory at us, and they don't prove a thing. They don't prove anything. They don't show that we have taken a single cent out of that Oyster House which should have been reported to the Government. And your bill of particulars, as I say to your Honor, I have examined the new rule and the commentaries of the committee, and they simply state in there that the rule as pertaining to bill of particulars is the same as it was in the past. There is no change in it. [504]

I realize there has been changes in several regards where you—where under our judicial code, our new judicial code, you look actually to a question of



prejudice rather than to one of form. I realize that. But, there has been no change in the bill of particulars at all that I have been able to find. If I had, I would—I wouldn't make this argument, or at least, I would inform your Honor. But when they say that that's what they are going to prove, I think we are limited.

It's no different than the—than a morphine case which went on the basis of a formula, the defendant was charged with selling morphine and he asked for a bill particulars to set out what formula it was, and he said it was some—the Government stated that it was a certain derivative of morphine. The defendant came in to defend and they proved—the Government proved that it was another derivative of morphine, very little difference between them. The Court submitted the matter to the jury and the defendant was found guilty, and on appeal to the Circuit Court, the Circuit Court said, "No." It says, "You charged him with a certain, specific matter. He has come in to defend on that certain, specific matter. You haven't proved it." And they threw the case out, and I think properly so. And they stated therein that even [505] though that may be technical, that still it was sound law. Now, there's a difference between, as I see it, a matter which is prejudicial and which isn't, and one which is technical and one which is not technical. It may be sound, even though it is technical. I feel—I feel, frankly, that failing to—failing to prove what they allege in this case, that they just haven't made a case.

The Court: Mr. Ursich, if the jury believed the Government's witnesses, they believed that the income, at least a major part of it, came from the California Oyster House——

Mr. Ursich: Well, a portion——

The Court: ——that item was included in the—— in your bill of particulars, so you have no basis to complain that the Government made proof outside of the bill of particulars. You might complain that they didn't prove each item, or offer any proof on each item of the bill of particulars.

Mr. Ursich: Of course, that, your Honor, when your Honor states that, you arrived at a conclusion that the jury must have assumed. The only way they could have reached a conclusion was on the basis of assumption that it came from the—from the Oyster House.

The Court: No, I didn't say that they [506] assumed it; I said they must have found.

Mr. Ursich: Yes, your Honor, they must have found. I agree with you there, but that finding must have been based on assumption. It couldn't have been based on any evidence, because there wasn't any. All of the testimony, even on the net worth theory, all the testimony of Mr. Swanson was based on assumptions. Time and time again in there when he was asked how he arrived at that, he had assumed figures all the way through. And even if you are going to go on a net worth theory, you've got nothing but assumption in the entire case. There is several places in his testimony, which

I have here, where he says, "I assumed that this money came from the Oyster House." That's in his testimony.

The Court: The Court is quite familiar with the testimony. I followed it very closely. And upon that ground, I am satisfied, Mr. Ursich, that you have no basis upon which to rest—or that the Court would have no basis upon which to rest a finding that there was such error committed, and that this verdict be set aside.

Mr. Ursich: Just in closing, I don't want to go further on this question, I just want to say to your Honor this, that I believe we have examined every income tax which has been appealed, and we have not, assuming [507] the correctness of the theory, we have not found any case, not a single case, that was drawn criminally on straight net worth. In each and every case that we have examined there has been specific proof of a—of money earned in that certain year.

The Court: Well, I don't know what cases you have in mind; but if your position were sound, all the taxpayer would need to do is destroy all of his records, if he is in business, and thus defraud the Government of income tax and be immune. The situation of net worth arises only where the taxpayer has not kept records, and in this case the evidence was uncontradicted that this taxpayer kept no records whatever.

Mr. Ursich: He—well, of course that's your Honor—

The Court: That's the purpose of the Treasury regulation, evidently, in taxing for civil liability——

Mr. Ursich: That is correct.

The Court: ——is based upon the net worth. These regulations, while not statute, carry with them in many instances an authority equal to the statute, because the statute confers upon the Treasury Department the right to make regulations for their effective enforcement.

Mr. Ursich: The—I have to agree with [508] your Honor, as far as civil is concerned, that a man may be found to owe a tax by reason of his failure to keep adequate records, and he may be penalized up to fifty per cent, but I still say that's a long ways from making the man a criminal. I know of nothing—I know of no case, no law, which states that on straight net worth, even though a man is derelict in the keeping of his books, that fact alone isn't sufficient to convict him.

The Court: The net worth, as the Court charged in this case, becomes a circumstance for the jury to consider, together with all of the other facts and circumstances as to whether there was a wilful attempt to evade tax.

Now, are there some other phases of your motion, Mr. Ursich, that you desire to argue?

Mr. Ursich: Yes, your Honor, there are—there are just two other points which I shall touch on briefly. I will say that the argument I have been making is our chief argument.

With reference to Mr. Nielsen's testimony, he made a statement about when he first saw Mr. Barcott. I think he stated as follows: "I told Mr. Barcott the purpose of investigating such transactions was to determine if the money was used in black market activities, and if the [509] money was properly reported for income tax purposes." On the basis of that preliminary statement, the Court allowed certain evidence—certain testimony of bribery to be admitted by Mr. Nielsen. I submit to your Honor that that element of bribery, of course, is only a circumstance to—tending to show guilt, that it must specifically relate to the crime which is being investigated.

Now, in this case the witness testified that he called to his attention black market activities as well as income tax matters. Now, the question arises whether or not the man—whether or not the defendant, if we believe the testimony of the witness, had a guilty mind as to income tax evasion or whether or not he had a guilty mind as to black market activities. I can't see how, on the basis of that preliminary testimony, the Court should have allowed that evidence to be submitted, because this again reaches the realm of speculation, where a man is being investigated for two crimes and at one time he makes an offer for his liberty, how is the Court, the jury, or anyone else to tell what he is trying to—wherein lies his guilty mind, unless he is charged with both crimes. I submit to your Honor that that is quite a stretch, to allow that testimony to have been admitted in this case under those circumstances. [510]

I call your Honor's attention to some cases which we have read in regard to the defendant's flight. They go on the same basis as offers of bribe, that is, they show a guilty mind. In those cases where the defendant fled when he was charged with a different crime, and the evidence was offered in the case, the Courts have held that it certainly couldn't show any evidence of guilt as to the specific crime with which he is now charged.

Now, I frankly say to your Honor that that's as close as we've come on this subject. But, it seems to me common sense would dictate, under these circumstances, particularly where evidence of that nature is so vitally damaging, where it is not clearly set out in the preliminary examination, and specifically pegged down to the case which—to the charge in the indictment, that then the matter should not be submitted to the jury.

On your Honor's instructions, I only have this comment to make: We feel as a whole the instructions were as fair as any that were—that we have ever heard given by any Court. We do wish to call your Honor's attention to the one that went on the net worth basis. Our theory throughout was that there was no such thing as a net worth theory in this case, and that your Honor failed to—your Honor erred in instructing on that theory. [511] We didn't even object at the time, for the reason that the entire case had gone on that basis, and we couldn't see where any other—where a special objection to the instruction would have done any good;



either the case falls on the testimony, or it's made on the testimony. If the testimony is in correctly, your Honor's instruction is correct.

That's all that we have, your Honor.

The Court: Do you desire to make an argument, Mr. Hale?

Mr. Hale: I won't make any.

The Court: The motion for a directed verdict, which was made at the conclusion of the trial, before the case was submitted to the jury, and is now made again, will have to be denied.

And, likewise, the motion for a new trial will be denied.

The complaint that is made as to errors committed during the course of the trial rests primarily upon the basis that the Government's proof was not direct and specific but was circumstantial, the Government relying upon net worth from year to year rather than relying upon actual proof as to what the income of the defendant was. When a motion for a bill of particulars was made in this [512] case, I expressed some doubt whether the facts were such as to justify, in the exercise of sound discretion, the making of an order granting such a motion, but did grant it, and the Government submitted a bill of particulars reciting three different sources of income, the principal and primary source being from the business known as the California Oyster House. The proof, as I recall it, was meager, or not at all, on two of these items; that is, the proof indicated that there were dividends received, and that there was interest received, but not that it was



falsely returned. On the other hand, it would be impossible to say whether it was the interest money that was deficient in the aggregate return, or whether it was from some other source.

Then the proof as to income from the business was dependent upon the calculations made upon net worth during the years here involved. It seems to me a taxpayer is not in a very good position to complain when the Government, in the collection of its income taxes, is compelled to resort to that method, when he himself has violated the regulations and the spirit of the act, if not the letter of it, by failing to keep any records whatever. If such were the case, then every dishonest taxpayer who is engaged in business could avoid the liability of criminal penalties, [513] by merely destroying his records, from day to day or year to year. In this case, the jury were warranted in finding that these records were destroyed. If a cash register is kept, and the tape on the cash register—that certainly could have been preserved. The customers paid for their meals on little checks that were given them. They might have been preserved, but all record was lost in this case.

And the net worth theory adopted by the Government indicated a tremendous increase in wealth during the years involved. And there were many other circumstances in this case that pointed a strong finger of guilt toward the defendant in his attempt to evade the payment of his taxes. He offered evidence showing how his wealth had been accumulated during the lean years of business in

Tacoma and in the nation as a whole, and how during the prosperous years his business was making a far less income than that indicated by the Government's testimony. The jury evidently saw fit not to accept that explanation, and I am not surprised that they did not, because it's scarcely in keeping with reason.

The defendant complains and asks for a new trial because the Court permitted testimony of an attempted bribery, stating that the defendant was under the [514] impression that perhaps he was being investigated for black market activities. I cannot recall a word of testimony by the Internal Revenue agents that they ever stated to the defendant that they were investigating him for black market activities. The whole testimony, as I recall it, was that they were checking on him for the purpose of ascertaining if he had attempted to evade income tax.

And the circumstances of having large sums of cash in his possession, having two safe deposit boxes, and having no records whatever of a substantial business, all point to the fact that he had full knowledge that he was being investigated for the failure to make full and complete and honest proper returns; and the jury must have found, and I do not hesitate to say that there was substantial evidence for them to find, that he did attempt to bribe the Internal Revenue agent; and if the agent had of been of the low standards, such as the defendant apparently thought him to be, and had have taken a bribe, why, of course, the case might never have been heard of again, and again it might have.

Now, if it's conceivable to visualize a circumstance that indicates guilty knowledge, such actions certainly fall within that category. I confess that that [515] evidence was extremely damaging to the defendant. The jury found it was true. The fact that it was against interest and damaging, would not make it incompetent, but quite the contrary.

On the question of instructions, I have already, I think, covered that by what has been said concerning the admission of evidence in the trial of the case on the theory that net worth would have to be the basis of what the income was. So for these reasons, among others, I shall deny the motion, likewise, for a new trial; and since the Court heard this testimony and heard the defendant's story and his wife and friends and others, I see no particular need for a probation officer report in this case, and the record, therefore, will show that a pre-sentence report will not be required.

I would hesitate for another reason to ask for a pre-sentence report, although I would ask for it if I were in doubt concerning the background and history of this defendant; but I dislike to ask for it if the defendant should desire to appeal, and if this Court were reversed on such appeal, a pre-sentence report might at least be thought to be prejudicial to the defendant if another trial were granted. I do not want to place him in a position where he might be embarrassed in that manner. While these [516] pre-sentence reports are supposed to be in the hands of the Court only, the Department of Justice occasionally requires that they be

sent to other agents of the—of that Department, and I shall not ask for any pre-sentence report in this case. But the defendant may come forward and the Court will pronounce the judgment and sentence.

Mr. Barcott, do you have anything that you want to say before judgment and sentence is pronounced in this case?

Mr. Barcott: No, I have nothing to say.

The Court: Mr. Ursich?

Mr. Ursich: I think your Honor has a sufficient knowledge of this man's background, and he will take it into consideration when he does pass sentence.

The Court: Mr. Barcott, in this case, and in similar cases, it is always the unusual situation where the defendant has a clear record heretofore. Everything indicates that in all the years that you've lived in Tacoma and in the United States, you have complied with the law, your record has been good, you have raised a family, you have two fine sons, you developed a little business into a very lucrative one; and were you the only offender of this kind that ever came before the Court, I wouldn't have the slightest hesitancy in granting probation and the assessment [517] of a fine, but in this type of case the Court cannot—I feel I cannot consistently do so and hope to ever accomplish the purpose that Congress had in mind when they enacted the penalty provision of income tax laws.

Punishment in these cases is more a deterrent to others who might do as you have done, and the jury

found that you did, than it is to reformation of the individual. No sentence in the penitentiary, however long, nor however short, is going to reform you, and that might be said of each defendant who appears in this Court for violating income tax laws; but a penalty that is assessed to you might be a warning to the hundreds of others who in years of prosperity refused to share, as the law called upon them to do, their income with their Government. And, of course, the Government couldn't exist if it didn't collect tax. There are some thirty or forty million taxpayers. The Government couldn't exist if they had to assume that every one of us were trying to cheat it, and had to explore each of our returns.

So the Government must rely, of necessity, and it does very successfully, upon the honesty of the individual, being extremely liberal, and when there is a question of doubt as to whether they owe money or don't owe money, they resolve the doubt in their own favor, and they [518] are rather expected to do that. But when they go beyond that, then the Government says if it's done with knowledge and understanding and wilfully, it's a crime. But, they have adopted a policy, and there is law that supports the policy, that when the individual, even if he has wilfully cheated the Government, comes forward afterward and seeks to file an amended return and confesses his shortcomings and pay all of the penalties, a criminal prosecution rarely ever follows, because the policy of the Treasury is to invite people to come in and pay, and it assesses civil penalties,

and be forgiving; but when the Government is compelled to ferret out these shortcomings, as in your case, and in other cases, then they not only assess the civil penalties but they call upon the citizen to answer on the criminal side. When the individual comes in Court, after all of the facts have been discovered, and then confesses his shortcomings, he places himself in a somewhat better position than when he comes into Court and denies all of the charges that have been made against him, he becomes a witness in his own behalf and calls others to do so, and adds to that wrongdoing the further offense of false testimony, well, we have a different situation again.

Now I feel in your case with the verdict of the jury, which to me, was based upon substantial [519] evidence, fully warranted, that you did just those things. In your own mind, you might irrationalize to the degree that you feel that you didn't mean to cheat anybody, and you didn't, that may be your conviction. Your attorneys have presented your case very ably, and they have accepted your statements, as they should. The jury did not, and the Court is inclined to agree with the jury. The jury, by their finding, it seems to me must have determined that you thought you could "buy off" an officer of the Government by giving him five hundred dollars.

It is unfortunate that you entertained such a view concerning public officials. It may be that some of them are of that low type that they have so little regard for their oath, and their country, as to "sell out." But, that's rarely found in officers such as



do the work for the Internal Revenue Department or other of these older established Government agencies.

I am not going to assess any punishment for attempted bribery, nor for perjury; but you are not in a position where you have a right to ask the Court to be extremely lenient with you because you have been penitent and you are sorry for what you have done. You have adopted quite the contrary attitude. According to these figures, roughly, on your half, if you had not have been discovered you [520] would have gotten away with five thousand dollars of money that belonged to the United States Government, and an equal amount in your wife's return, which would have been ten thousand dollars, over this three years. Now you will have to pay all of that, plus penalties perhaps of fifty percent of the amount. In addition to that, you are called upon to answer to this criminal charge, and you have brought disgrace upon yourself and your family in your declining years.

I wish that it were possible for every taxpayer who thought that they could withhold money that belonged to their government because the government had created a situation where they had become prosperous, to fully appreciate and understand your plight; and I am sure that there would be millions of dollars that the Government isn't now getting that they would be getting then. If there is any field of public offenses where crime does not pay, when once detected, it's in this matter of paying



Federal taxes—income taxes, because the penalties that pile up far exceed what it would have cost if the tax had been paid.

The jury, by their verdict, having found you guilty, it is the judgment of the Court that you are guilty. The sentence of the Court on count one of the [521] indictment, that you be committed to the custody of the Attorney General of the United States, or his duly authorized agent, to serve a period of ten months and to pay a fine of seven hundred and fifty dollars; on count two of the indictment, a like sentence and a like fine; and on count three, a like sentence and a like fine; and the sentence will carry the costs of this prosecution. The jail sentences, or confinement sentences, will run concurrently and not consecutively. In other words, the sentence will be one of nine months. The fines, however——

Mr. Sager: I thought you said “ten.”

The Court: Or ten months, I mean. The fines, however, will be separate as to each count, or a total of two thousand, two hundred and fifty dollars, and costs. Now, what is the bond in this case?

Mr. Ursich: Twenty-five hundred dollars, if your Honor please.

The Court: Unless you show some reason to the contrary, Mr. Sager, I see no reason to increase the bond, if you intend to appeal; if you do not intend to appeal, then the defendant will forthwith be taken into custody.

Mr. Ursich: No, your Honor, we do intend to appeal.

The Court: Well, the bond will remain [522] then at twenty-five hundred dollars. The defendant is a family man, and living here, and I see no reason to increase that bond. And you will come back into Court at eleven-thirty? Can you be in, Mr. Sager?

Mr. Sager: No, that's going to crowd me some way or other.

The Court: Eleven-forty-five?

Mr. Sager: I think probably by that time, yes.

The Court: And then the Court will sign the formal judgment and sentence.

Mr. Sager: Very well, your Honor.

Certificate

I, Russell N. Anderson, official court reporter for the above-entitled court, do hereby certify that the foregoing is a true and correct transcript of the matters therein set out.

/s/ RUSSELL N. ANDERSON,  
Official Court Reporter. [523]

[Endorsed]: No. 11803. United States Circuit Court of Appeals for the Ninth Circuit. John Barcott, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed January 29, 1948.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11803

JOHN BARCOTT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH  
APPELLANT INTENDS TO RELY

Comes now the appellant through his attorneys of record and respectfully submits the following statement of points upon which he will rely in his appeal in the above entitled cause.

I.

The Court erred in denying the defendant's motion for judgment of acquittal, or in the alternative for a new trial, on the grounds and for the reasons as set forth in said motion. (Transcript of Record, pp. 41, 42.)

II.

The Court erred in denying defendant's motion for judgment of acquittal at the conclusion of the plaintiff's evidence. (Reporter's Transcript of Testimony, pp. 119-134, inc.; 136-142, incl.)

## III.

The Court erred in denying defendant's motion for judgment of acquittal at the conclusion of all the evidence. (Reporter's Transcript of Testimony, pp. 438-441, incl.)

## IV.

The verdict is contrary to the weight of evidence and is not supported by any substantial evidence. (Reporter's entire Transcript of Testimony.)

## V.

The Court erred in denying defendant's demand for an offer of proof and objection to testimony of the witness Nielsen concerning the purported bribe offer. (Reporter's Transcript of Testimony, pp. 22, 23.)

## VI.

The Court erred in denying defendant's motion to strike purported testimony of the witness Nielsen pertaining to purported bribe offer. (Reporter's Transcript of Testimony, pp. 24, 25; 32-37, incl.)

## VII.

The Court erred in overruling defendant's objection to plaintiff's Exhibit No. 11. (Reporter's Transcript of Testimony, pp. 58, 59.)

## VIII.

The Court erred in overruling defendant's objection to the testimony of the witness Swanson pertaining to defendant's alleged net worth. (Reporter's Transcript of Testimony, pp. 77-96, incl.)

## IX.

The Court erred in failing to instruct the jury in a manner set forth in defendant's requested Instruction No. 2, and in failing to otherwise instruct that the Government was under the burden of proving beyond a reasonable doubt that the income alleged to have been received by the defendant during the years 1943, 1944 and 1945 and upon which no tax was alleged to have been paid, was derived from the sources set forth in said indictment as particularized in the bill of particulars. (Transcript of Record, pp. 29-37, incl.)

## X.

The Court erred in instructing the jury on the theory of net worth for the reason that:

(a) The evidence of the Government failed to establish any net worth of the defendant during the years 1943, 1944 and 1945 except by conjecture and speculation.

(b) That said instructions create a fatal variance between the pleading and the proof by authorizing the jury to convict the defendant without regard to the sources from which he is charged with having derived his income and upon which he failed to pay a tax. (Reporter's Transcript of Testimony, pp. 490-492, incl.)

## XI.

The Court erred in submitting the cause to the jury on the theory of increase in net worth of the defendant during the years 1943, 1944 and 1945. (Reporter's entire Transcript of Testimony.)

## XII.

The Court erred in failing to limit the Government in its proof in conformance with the indictment and bill of particulars, and in allowing the Government to offer evidence in substantial variance therewith. (Reporter's Transcript of Testimony, pp. 72-116, incl.)

## XIII.

The argument of counsel as appearing on pages 471 and 472 of the Reporter's Transcript of Testimony was of such a highly inflammatory and prejudicial nature, and which argument was without the issues and unsupported by the evidence as to amount to misconduct of counsel which was incurable by the Court's instruction to the jury to disregard a portion thereof.

## XIV.

That the Government failed to prove that the defendant derived any income whatsoever during the years 1943, 1944 and 1945 upon which he failed to pay an income tax. (Reporter's entire Transcript of Testimony.)

## XV.

That the Government attempted to prove the net worth of the defendant during the years 1943, 1944 and 1945, respectively, by merely showing expenditures during those three years, but without showing

any unreported income whatsoever, and without offering any evidence as to the defendant's actual net worth prior to 1943. (Reporter's Transcript of Testimony, pp. 18-37, incl., 72-116, incl.)

XVI.

That the entire Government's case is speculative and conjectural in that it is based upon an estimate as to the defendant's earnings and income from the years 1919 to January 1, 1943, and such estimate is wholly unsupported by any evidence whatsoever.

Respectfully submitted,

GAGLIARDI, URSICH &  
GAGLIARDI.

/s/ FRANK HALE,

Attorneys for Appellant.

Copy received February 10, 1948.

/s/ J. CHARLES DENNIS,

U. S. Attorney. LHB

[Endorsed]: Filed Feb. 10, 1948.



[Title of Circuit Court of Appeals and Cause.]

APPLICATION FOR ORDER, AND ORDER  
ELIMINATING EXHIBITS FROM THE  
PRINTED TRANSCRIPT

Comes now the appellant above named and by and through his attorneys respectfully makes application to the court that all of the exhibits offered or received in evidence be considered in their original form by the court without the requirement that such exhibits be printed as a part of the record.

This application is made for the reason that many of the said exhibits are lengthy and voluminous and the printing thereof would be unduly expensive; that the court can more conveniently and expeditiously consider the same in their original form.

GAGLIARDI, URSICH &  
GAGLIARDI.

/s/ FRANK HALE,  
Attorneys for Appellant.

So ordered:

/s/ FRANCIS A. GARRECHT,  
Senior United States  
Circuit Judge.

[Endorsed]: Filed Feb. 10, 1948.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF  
RECORD TO BE PRINTED

To the Clerk of the Above Entitled Court:

Comes now the appellant above named and by and through his attorneys of record herein respectfully requests and designates that the entire transcript of record in the above entitled cause be printed, with the exception and excluding all of the original exhibits offered or received in evidence and heretofore transmitted to the above entitled court in the above entitled cause.

GAGLIARDI, URSICH &  
GAGLIARDI.

/s/ FRANK HALE,  
Attorneys for Appellant.

[Endorsed]: Filed February 10, 1948.